

**September 27, 2004**  
**Testimony by Assemblywoman Lois Wolk**  
**California Performance Review Commission**  
**Public Hearing on Government Reorganization**  
**University of California at Davis**

Chairmen and Commission Members:

I want to thank you for allowing me to testify here today. The issue of tax administration and tax appeals is one I spent a great deal of time on this past legislative session. There is a lot of history to this issue, and my legislative effort to establish a tax court has added several reams to that history, including many thoughtful articles, letters, and editorials in favor of this idea. I have already supplied you with some of these materials.

As for the CPR's recommendation, let me begin by saying that I agree with the CPR's three findings about current tax system being: duplicative, inefficient, and confusing for taxpayers. Consolidating the various tax administrative functions will indeed achieve greater efficiency and simplification. But the proposal is seriously flawed from an equally important viewpoint -- namely tax fairness.

The problem is with how the CPR proposal handles the Board of Equalization. Under the proposal, the members of the Board of Equalization would be "ex officio" members yet the CPR suggests no change in the BOE's current jurisdiction over tax appeals. Thus, the Board members would be directly administering both current FTB and BOE tax collection functions and then put on another hat, a quasi judicial one, acting as an independent appeals body -- a serious conflict of interest and a violation of the principle of separation of powers.

Consolidation of tax collection makes sense, so long as appeals are kept separate. One could keep the BOE as solely an appeals body, and remove all administrative functions (other than the obscure Constitutional responsibility of property tax equalization) But the track record of the BOE in hearing appeals has not been good. The members of the Board are politicians who campaign for election every four years. They need to raise millions of dollars in campaign contributions. Unfortunately, significant campaign contributions have come from entities who appear before the Board, such as the accounting firm Price Waterhouse Coopers, who circumvent conflict of interest rules by making contributions through their own PACs. Also, no rules prevent the private lobbying of Board members concerning pending cases. Frankly, it's disgusting and an insult to honest taxpayers who have to carry more than their fair share because others are better connected or because decisions were made based on politics and not tax law.

The unfairness of California's tax appeals process is known nationwide. A 2004 national survey of chief financial officers by CFO.COM asked the question "*How would you rate the independence of this state administrative appeals process – tax board, administrative law judge, or tax court – from its audit department?*" California ranked as the third worst in the nation!

The solution is to create a State Tax Court, modeled after U.S. Tax Court, to hear appeals from actions by the new Tax Commission. This has been recommended many times in the past because it is proven to work. My legislative proposal to set up a tax court passed the Judiciary Committee in the Assembly. Companion legislation to restrict PAC contributions to BOE members passed the Senate with bipartisan support, despite heavy lobbying by BOE members and staff, but it failed on return to the Assembly.

Establishing an independent appointed State Tax Court, with real judges who know the law, base decisions on legal precedents using standard rules of evidence, and publish their decisions, would result in a far more fair system for California taxpayers.

I believe this Commission must address this problem squarely for any proposal to reform California's tax system to be taken seriously. Fortunately, you have a proven model that works and one that has been recommended by at least two prior bipartisan Commissions similar to yourselves.

Listen to what Governor Pete Wilson's bipartisan Constitution Revision Commission chaired by your very own co-chairman, Mr. Hauck, said about this issue in 1996:

*"The Commission recommends abolishing the Board of Equalization and the Franchise Tax Board and combining their regulatory and executive functions and those of other major revenue agencies into a new Department of revenue. Additionally, a state tax appeals body should be established, appointed by the governor and subject to senate confirmation."*

As recently as December of last year, another bipartisan commission, the Commission on Tax Policy in the New Economy, unanimously made a similar recommendation:

*California should establish a state administrative body to operate like the U.S. tax court. This body would resolve all tax disputes, including personal income tax, corporate income tax, sales and use tax, property taxes, payroll taxes, and excise taxes in accordance with the principle set forth in Professor Simmons' September 23, 2003 letter to the Commission."*

Professor Simmons, I should add, is our very own UC Davis Law School expert on this subject and I urge this commission to avail yourself of his expertise on this and other tax issues you may consider.

Let me just conclude by saying this issue has been well studied for decades and there is a broad consensus on the right solution. The only thing lacking has been the political will. I hope this Commission and this Governor can muster that will to make this long overdue reform a reality.

Thank you again for allowing me to testify today.

Written submissions accompany this testimony:

Constitution Revision Commission, Final Report (excerpts), 1996  
California Commission on Tax Policy and the New Economy, Recommendation 2003  
Letter, Professor Dan Simmons, September 23, 2003  
Opinion by Assemblyman Tom Harmon, Orange County Register, August 25, 2004  
CFO.COM 2004 Tax Survey  
California Tax Court: It's Time To End "Pay-to-Play" in California, by Chuck Moll et al.  
Assembly Bill 2472, by Assemblywoman Wolk and others  
Letters of Support for Assembly Bill 2472:  
    California Tax Reform Association  
    California Labor Federation  
    California Bankers Association  
    California School Employees Association  
    Service Employees International Union  
    California Society of Enrolled Agents  
    California Federation of Teachers  
    California Nurses Association  
    Genentech  
    California State Bar Association, Taxation Section  
    William Weintraub, First Vice Chair, L.A. County Bar Association, Tax Section



CALIFORNIA CONSTITUTION  
REVISION COMMISSION

FINAL REPORT  
AND  
RECOMMENDATIONS  
TO THE GOVERNOR  
AND THE LEGISLATURE

1996

# Executive Branch

makes for more consistent government. Only eleven states currently elect an insurance commissioner.

The existence of an elective insurance commissioner blurs responsibility for policymaking. Voters have difficulty determining who is accountable for state insurance policies. The primary benefit of Proposition 103 is that it provided new rules for the regulation of insurance rates. There do not appear to be any particular benefits derived from electing an insurance commissioner. Changing the status of the insurance commissioner from elective to appointive will not have an impact on insurance legislation and policies, which will continue to be set by the legislature and governor through statute or initiative.

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**3. Abolish the Board of Equalization, merge tax administration functions, and appoint a tax appeals board.**

***The Commission recommends abolishing the Board of Equalization and the Franchise Tax Board and combining their regulatory and executive functions and those of other major revenue agencies into a new Department of Revenue. Additionally, a state tax appeals body should be established, appointed by the governor and subject to senate confirmation.***

The Board of Equalization was established in the 1879 constitution. The BOE is comprised of five board members, including the state controller and four members who are elected geographically. The BOE essentially acts as a regulatory and appellate body for a variety of state tax policies.

In the late 1920s, the state began to examine the growing number of agencies—including the Board of Equalization—that had a responsibility for the administration of the tax system. In 1929, the California Tax Commission recommended: "that the elective State Board of Equalization be abolished and that in its place a permanent professional tax commission be established consisting of three members appointed by the Governor for terms of six years."<sup>7</sup> Since then, eleven additional studies under six governors have concluded that the state's tax administration system should be revised. Eight of these studies called for the elimination of the Board of Equalization.

The Board of Equalization (BOE) and the Franchise Tax Board (FTB) perform a variety of functions related to collecting major state and/or local taxes, including: 1) the quasi-administrative functions required to operate a program; 2) the quasi-legislative functions needed to set administrative policies to govern the programs; and, 3) the quasi-judicial functions involved in settling disputes that arise from carrying out assigned functions.

The board's administrative functions include collecting state and local sales and use taxes, and business and excise taxes and fees. This includes taxes and fees levied on gasoline and diesel fuel, insurance, cigarettes, alcoholic beverages, electricity, and hazardous and solid wastes. The board also administers taxes on behalf of other agencies, such as cities, counties, and transit agencies, which are authorized to levy sales and use taxes. Other administrative duties of the BOE include assessing public utility property in order to allocate value to each taxing jurisdiction. The BOE also adopts rules and regulations for administering business programs and for guiding and directing

# Minority Report

state government is given new responsibility to rank and rate the performance of local government according to comprehensive criteria. Our recommendations continue and accelerate the movement to make local government—which remained well into this century the primary and largest agency of government in America—into subservient local administrative units.

The specific recommendations of the Commission do not all fit into this theme. Several, concentrated especially in the executive branch, are salutary and we support them. But the thrust and meaning of the Commission recommendations is plainly as we have stated it above. We proceed then to an examination of the recommendations.

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We begin with the section of the Commission recommendations in which there are substantial items to praise.

## Executive Branch

The proposal to reduce the number of statewide elective offices follows the thinking of the *Federalist* that unity in the executive is the best means to secure both energy and accountability. By making these offices appointive and under the direct supervision of the executive, policy-making becomes more streamlined and consistent, and the people know better whom to blame.

The recommendation to combine the Franchise Tax Board and the Board of Equalization into a single agency is also good, but carried off badly in an important detail. Two taxing agencies waste money, duplicate one another, and dissipate accountability. The new agency would be run by a director, appointed by the governor, which is fine. But the tax appeals board would also be appointed by this same process, which makes it vulnerable to political pressure to get money for the state. Woe to the taxpayer who goes before this board when the governor and the legislature are scrambling to make up a deficit.

Many of us also think that the consolidation of executive agencies goes too far when it includes the Treasurer, who has fiduciary responsibilities that might conflict with the political interest of a governor.

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We do little good and much mischief with the recommendations concerning the legislative branch. In particular:

## Legislative Functions

- The Commission proposes to have initiatives that amend the Constitution confined to the November general election ballot, but initiatives generated in the legislature are exempted. We see no reason for the exemption of the legislature from this restriction, except to give their proposals—and not those of private citizens—whatever political advantage is available on





# California Commission on Tax Policy in the New Economy

## Final Report

DECEMBER 2003

### State Tax Court

**Recommendation (unanimous):** California should establish a state administrative body to operate like the U.S. tax court. This body would resolve all tax disputes, including personal income tax, corporate income tax, sales and use tax, property taxes,\* payroll taxes, and excise taxes in accordance with the principles set forth in Professor Simmons' September 23, 2003 letter to the Commission.

**Background:** Proposals to form a state tax court have been discussed in California over the last 30 years. The Commission's recommendation is to create an administrative body to hear tax disputes, rather than a court under the judicial branch. This recommendation is based, in part, on the long-held opposition of the Judicial Council and other major stakeholder groups to tax courts and other specialty courts. Also, the creation of an administrative-level tax body conforms with the federal system, which has value in developing procedural rules. The process of decision-making in the U.S. Tax Court is not nearly as constrained by technical rules of process and evidence as that in judicial courts. Nonetheless, the existence of a dispute resolution process apart from elected administrators and policy advisors would help assure fairness in the resolution of cases on the basis of the facts and the law pertaining to the particular parties involved.

According to advocates of establishing a state tax court, the current system for both the administrative and judicial resolution of tax disputes in California does not provide a fair, reliable, or efficient means of resolving tax disputes, especially in comparison to the

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\* Including property tax disputes will require a constitutional amendment. Future discussion of this recommendation might consider eliminating jurisdiction over property tax issues from the proposed state administrative body.

procedures available to resolve federal tax disputes. The problems with the current tax-dispute resolution system in California may be summarized as follows:

1. The Board of Equalization ("BOE") is the only body in California to hear tax disputes on a prepayment basis. To get to a judicial resolution in Superior Court, taxpayers must pay the full amount of tax and interest assessed. Most taxpayers cannot afford this option and are therefore stuck with whatever the BOE or its staff decides. In contrast, federal tax disputes can be brought before the U.S. Tax Court without payment of tax. The mere possibility that taxpayers may exercise this option helps level the playing field between the Internal Revenue Service (IRS) and taxpayers and leads to more rational settlements.
2. Members of the BOE are elected officials and are not required to have any particular tax training or expertise. They are also, in a general sense, perceived as part of the same agency that administers the tax system. In contrast, Tax Court judges are well-trained and experienced tax professionals viewed as independent of the IRS and impartial.
3. Tax cases can be particularly technical and complex. The BOE only allows 10 minutes to present a case. Many practitioners feel compelled to contact Board Members in advance of the hearing (on an *ex parte* basis) to try to explain their cases. In contrast, a federal tax case can be presented in the format of a trial without absurdly short time restrictions.
4. The BOE publishes few of its decisions, thus providing little guidance to taxpayers. Since so few taxpayers avail themselves of a trial in Superior Court, there is very little judicial development of the state tax law. In contrast, the Tax Court publishes all of its decisions, thus providing valuable precedent as guidance to both taxpayers and the IRS.

Other policy reasons for an administrative state tax body, including the problem of an elected tax administrator, are set forth in Professor Simmons' letter, included in Appendix D.

The overriding theme of the proposal is conformity with federal procedures. Also, the creation of a state tax body should shorten the dispute-resolution process by reducing the number of steps needed to resolve a case. The system would not be duplicative; one level of administrative appeal and the hearing before the Board of Equalization could be eliminated. In addition, this proposal would reduce the need for staff at the Board of Equalization to find facts and draft decisions proposed for Board adoption. Some of the staff might be shifted to the tax body. Overall, an administrative tax body would create efficiencies in the decision making process that could result in cost savings to the State.

Example of an Administrative Tax Body Structure:

- The body could include five administrative law judges, appointed by the Governor and confirmed by the Board of Equalization or the Legislature. The administrative body would be formed under the legislative power rather than a court with stature equivalent to the Superior Court.

- The terms of appointment should be from 12 to 15 years.
- Each administrative law judge would probably require three law clerks and a secretary. The administrative body also would require a clerk's office and clerical personnel. The total number of people required would be in the range of 50.
- Cases would be heard by a single administrative law judge, who would make findings and draft an opinion. At the request of the chief administrative law judge or some number of the other judges, cases would be decided by the full body.
- The administrative body would develop its own procedures and rules of evidence. Following the lead of the U.S. Tax Court, strict evidentiary rules may not be necessary.
- The administrative body would publish its opinions as deemed by the judges to be significant. Other cases might be decided by unpublished memorandum decision.
- The administrative body might appoint masters to hear small tax cases, cases involving less than \$5,000 of tax deficiency and for which the taxpayer elects a small case procedure. Decisions in small tax cases would be final, with no right to appeal.
- Decisions of the administrative body would be reviewable by the California Courts of Appeal.
- Appeals would be allowed both to the taxpayer and the Franchise Tax Board.
- Petitions for hearing before the tax body would be filed after an assessment by the Franchise Tax Board becomes final. Taxpayers would not be required to pay the tax before filing with the tax body.
- The administrative procedure before a final assessment could be shortened to include a single appeal before an appeals officer of the Franchise Tax Board or Board of Equalization.
- The tax body jurisdiction would include the individual income tax, the corporate and bank franchise taxes, sales tax disputes, and disputes over other taxes as the Legislature would determine. The list might include all taxes administered by the Board of Equalization. The tax body might also be empowered to hear appeals of local tax assessments following denial by a county board of supervisors.\*
- An alternative option to the tax body would remain for taxpayers to pay the tax and file a suit for refund in the Superior Court, in which case the taxpayer would forego recourse to the tax body.

**Comments from the Employment Development Department (EDD):** Since the proposed state tax body would cover payroll tax disputes, this would impact the role of the EDD in tax dispute resolution. The EDD is responsible for administering California's payroll tax programs, along with the Unemployment Insurance (UI) and Disability Insurance (DI) benefit programs that provide wage replacement for California's workers.

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\* The right to appeal might be restricted to questions of law, rather than a reassessment of fair market value.

The four taxes administered by EDD are: UI and Employment Training Tax (employer-paid) and DI and Personal Income Tax withholdings (worker-paid).

Although the term “payroll taxes” was not defined, it would most likely include, at a minimum, the four payroll taxes administered by EDD: UI, ETT, DI, and PIT. It is unclear whether this definition would extend to other taxes and fees for which employers are responsible, such as workers’ compensation.

It should be noted that substantial analysis would be necessary to determine how EDD’s payroll tax functions could be incorporated, while maintaining conformity with U. S. Department of Labor requirements for States’ UI tax structures. Additionally, further exploration would be needed to define the future role of the California Unemployment Insurance Appeals Board with regard to the UI benefit program appeals process.

**Type of Action Required:** Statute and Constitutional Amendment.

A constitutional amendment would be needed if property tax were to be handled by the proposed state tax court instead of local assessment appeals boards for locally assessed property and instead of the Board of Equalization for Section 11 property.

**Balance of State/Local Authority:** No impact. At the Commission’s September 9, 2003 hearing, there was some discussion about whether the state tax body would have jurisdiction over local tax disputes. It was clarified that local tax disputes were not included in this proposal.

State Tax Court		
Guiding Principle	Pro	Con
Fairness	<p>The highest forum to which most taxpayers can pursue their tax appeals without payment of tax, interest, and penalty is the State Board of Equalization. Board members serve for limited terms and are not required to be trained specialists in tax law.</p> <p>With certain limited exceptions, an administrative resolution of disputes does not take into account the “hazards of litigation.” This factor, when objectively applied by independent tax resolution specialists, encourages the settlement of tax disputes. Instead, for many taxes, California maintains an all-or-nothing policy, thereby forcing taxpayers to concede the entire amount in dispute or pursue litigation.</p>	<p>California already has a tax court that is open to the public and directly accountable to the voters. It’s called the Board of Equalization (BOE), though perhaps the Board’s name should be changed to the California State Tax Commission. Both the BOE and the Franchise Tax Board have settlement programs, affording taxpayers the opportunity for administrative resolution with a staff of trained accountants, auditors and attorneys. In addition, taxpayers may take their case to a public hearing before the elected Members of the Board of Equalization. Each of the 5 members is advised by an independent staff of trained accountants, auditors, and attorneys, but unlike the proposed tax-body judges, they are accountable to the voters.</p>

State Tax Court		
Guiding Principle	Pro	Con
Fairness (continued)	In the context of resolving disputes between taxpayers and the tax collector, the elective nature of the Board of Equalization causes an inherent structural conflict. One can easily imagine that a campaign slogan for an elected tax collector would be, "Elect me and I will not collect taxes from you (even if those taxes are due under the law)."	
Simplicity	<p>There is no practical judicial alternative to dispute resolution. In the federal system, taxpayers unable to settle with the Internal Revenue Service can present their case to the U.S. Tax Court without paying any tax, interest, or penalty. In contrast, the resolution of most tax disputes in California in Superior Court requires the payment of tax, interest, and penalty in full before the Court gets jurisdiction. The argument is made that this requirement deprives most California taxpayers of any judicial resolution.</p> <p>Additionally, the judges of the U.S. Tax Court are trained and experienced in tax law. In contrast, virtually all Superior Court judges have no particular tax expertise.</p>	<p>The issue of pre-resolution payment of tax liabilities can be addressed without replacing the Board of Equalization with a Tax Body (then-Speaker Hertzberg introduced a bill to allow posting of a bond as an alternative to payment). The Tax Body proposal would take only tax cases away from Superior Court judges, even though there is no requirement that Superior Court judges have any particular legal specialization.</p> <p>The current system gives taxpayer an opportunity for a three-part resolution: (i) before the agency staff in the settlement programs; (ii) before the elected Board of Equalization; and (iii) in Superior Court, if the taxpayer chooses to pay the liability in full before suing for a refund.</p> <p>Substantial analysis would be necessary to determine how EDD's payroll tax functions could be incorporated, while maintaining conformity with U. S. Department of Labor requirements for States' UI tax structures.</p> <p>Further exploration would be needed to define the future role of the California Unemployment Insurance Appeals Board with regard to the UI benefit program appeals process.</p>
Efficiency/ Balance	The publication of decisions by the U.S. Tax Court provides a growing body of judicial precedent that can serve as guidance to all taxpayers. In contrast, California has a very limited number of published decisions on tax disputes.	The Board of Equalization publishes decisions on tax disputes. There is no need to create an unaccountable new agency primarily for this purpose.



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Commission on Tax Policy for the New Economy  
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STATEMENT PROPOSING THE CREATION OF  
A TAX COURT FOR THE STATE OF CALIFORNIA

Dear Commission Members:

This paper elaborates on my remarks to the Commission at my appearance on September 9, 2003. It was a pleasure to appear before the Commission and to participate with a panel of talented and informed advocates. I thank the Commission for the opportunity to address a topic that has been of interest to me for many years.

In 1978 I chaired a task force of the California Commission on Governmental Reform (Post Commission) that examined conforming the California income tax with the federal tax system. Since that time California has made great strides conforming the Revenue and Taxation Code with the Internal Revenue Code. I believe that anyone who thinks seriously about state tax issues would agree that state-federal conformity contributes to simplicity, efficiency, and economy in the collection of state individual and corporate income taxes. Recently, along with Professor Joseph Bankman from the Stanford Law School, I had the privilege of working with legislative staff, Franchise Tax Board personnel, representatives of California CPA's, representatives of the State Bar, and representatives of other interested parties, in drafting legislation to combat abusive tax shelters (SB 614 and AB 1601, which has passed both houses of the Legislature and has been sent to the Governor). All parties to those discussions asserted that conformity with Federal legislation is an important policy goal in crafting a California response to abusive transactions. Conformity remains a central policy goal in all California tax legislation. I suggest that conformity with Federal procedures in tax dispute resolution with a matching dispute resolution process is an equally compelling concept.

The Framers of the Constitution of the United States envisioned a governmental structure based on a separation of the powers of the legislative, executive, and judicial branches. This separation of function is one of the recognized hallmarks of our system of government. Executive and policy functions are in the hands of the elected executive officers of government and the members of legislatures. The judicial function of interpreting and applying enacted laws

to individual cases is in the hands of the judiciary. Of course, in California as in many other states, members of the judiciary are elected, most often after being appointed by the Governor.

The framers of United States' government were also careful not to provide for an elected tax collector. In its 2001-2002 annual report (page 5), the Board of Equalization describes itself as "the nation's only elected tax commission." The members of the California Board of Equalization are elected political people. Some are, or have been, members of the State Legislature subject to term limits, some members are, or have been, people who aspire to higher statewide political office. Only one member of the current Board had any particular expertise in taxation prior to serving on the Board.

In the context of resolving disputes between taxpayers and the tax collector, the elective nature of the Board of Equalization causes an inherent structural conflict. One can easily imagine that a campaign slogan for an elected tax collector would be, "Elect me and I will not collect taxes from you (even if those taxes are due under the law)." One member lists as an accomplishment of his current tenure on the Board the fact that he "is responsible for increasing the percentage of relief received by California taxpayers before the Board of Equalization." While that may be an appropriate position for an elected policy maker, it illustrates the inherent conflict between the executive function of the Board of Equalization, which is to supervise the collection of numerous taxes (and its concurrent role in developing tax policy and making recommendations to the Legislature), and a judicial function that involves the application of existing law to the facts of a particular case.

On the one hand, the job of the tax collection agency is to protect the State's revenue by collecting taxes that are due under the laws enacted by the legislature and signed by the Governor. An individual could campaign for the Board of Equalization on a position that big corporations and other big business, along with wealthy individuals, don't pay enough taxes. Another individual may campaign for the Board on the premise that taxes are bad for the California economy because they stifle investment. As elected officials, the members of the Board of Equalization have a legitimate policy role in the structure of the tax system which may be influenced by these varying positions. The overall position of the Board of Equalization could vary with each election cycle as the philosophy of the majority changes with new membership. That result is appropriate for the Board in its executive and policy functions. However, when these varying and changeable political views are brought to the judicial function of deciding individual cases, the result is an inconsistent jurisprudence that does not provide guidance, and therefore certainty, to taxpayers planning transactions for the future. Current interpretation of the tax law could change after the next election. In addition, the application of the elected member's political philosophy to the decision of individual cases may lead to results that are unfair either the taxpayer or to the State of California.

Two cases recently decided by the Board of Equalization illustrate the conflict. In LCI Logic Corp. and Cypress Semiconductor Corp., on a two to one vote, the Board allowed the refund of research credits in excess of the taxpayers' state tax liabilities. One member of the



Board was disqualified from participating because the member owned stock in one of the parties. One member was disqualified because of a campaign contribution from a company with the same issue pending before the Board. Of the ~~three~~ members deciding the case, one member was reported in the press as stating that granting the refunds was important "to encourage companies to invest in California"; a laudable policy goal but not an appropriate factor in applying the law to a specific case. Another member was reported as complaining about the "tally of givebacks that day," which also is an appropriate policy position but not a grounds for deciding individual cases. In addition, the President Pro Tem of the Senate attempted to affect the decision with a letter claiming that, "a misreading of this statute in favor of LSI Logic would result in revenue losses in the hundreds of millions of dollars, as other taxpayers would attempt to use the same inappropriate interpretation to yield a sales tax refund on top of fully utilized research credits."

The case illustrates another flaw in the existing structure. The taxpayer-favorable decision is the end of the road. Although a taxpayer who is dissatisfied with the ruling of the Board of Equalization may file a claim for refund and then file suit for a refund in the Superior Court (after again going through the administrative process), there is no equivalent provision for the Franchise Tax Board to challenge a taxpayer-favorable interpretation by the Board of Equalization.<sup>1</sup> There are two problems here. This system results in an unbalanced state of the law where taxpayer-favorable positions are not subject to review. In addition, because Superior Court Judges do not publish opinions, there is no readily available way to discover the law in this area. As a consequence the law becomes a "private" body of law known only to the practitioners who handle significant numbers of cases before the Board of Equalization, but unknown to business people who are trying to plan transactions that are affected by the State tax law.<sup>2</sup> This uncertainty can have a detrimental impact on business expansion plans.

A state tax court would eliminate the dilemma currently caused by California's politically oriented dispute resolution body. Creation of a state tax court also would achieve an economy and efficiency in the administration of the state tax law consistent with the principles adopted by the Commission. The concept of a state tax court offers several advantages.

- (1) A centralized tax court would develop a consistent body of discoverable interpretative law, based on precedent, to serve as a guide to the application of California tax statutes. Judges could be appointed with sufficiently long terms to provide consistency in the decision making process. Members of the court could be selected on the basis of expertise in the tax law and the possession of judicial temperament to decide cases by applying the law to the facts as found. Thus, the law would be applied based interpretation of the intent of the Legislature and the Governor, rather than on the basis of the policy views of independent elected officials sitting as judges.

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<sup>1</sup> For an example of a challenge to a taxpayer favorable decision by the Board of Equalization see Proposition 22 Legal Defense and Education Fund v. State Board of Equalization, Sacramento Co. Superior Court No. 01CS00718 (2001), which is cited in the Board of Equalization 2001-2002 annual report, p. 47, but not otherwise readily available for study.

<sup>2</sup> Board of Equalization opinions, although not all are regularly published, are available on commercial electronic legal databases.

- (2) The creation of a tax court would free the Board of Equalization to better function as a policy and executive organization. Creation of a tax court does not suggest termination of the important role of the Board of Equalization.<sup>3</sup> This also may positively influence the effectiveness of the Board as the State's principal tax collection agency. Like the United States Treasury Department, the Board of Equalization could influence tax policy through legislative recommendations, adoption and approval of regulations, and decisions on litigation positions.
- (3) Development of a consistent and accessible body of law interpreting California tax provisions would help to improve the California business climate. Investment decisions are based on assessment of after-tax rates of return. Calculating that return requires some level of confidence that there will not be retroactive applications of the tax law through varying and changeable interpretations of the law. The turnover of an elected board every four years increases the risk that the law will change. The possibility of an anti-taxpayer position increases the risk of an investment causing the investor to require a higher before-tax rate of return to compensate for the increased risk. That puts California at a competitive disadvantage. The possibility of a taxpayer-favorable shift in the Board of Equalization offers a lottery for higher after-tax rates of return. The uncertainty on either side discourages investment.
- (4) A state tax court could develop a fairer and more accurate dispute resolution system based on rules of evidence, findings of fact, and application of the law to the facts as found. The existing system relies on factual development by staff and optional brief appearances before the Board. Decisions are often made at the staff level, which is the repository of expertise for interpreting the law. Appearance before the Board may affect the outcome through attempts to sway the Board with emotional appeals. One Board member indicates that a more taxpayer-favorable outcome can be achieved through the simple expedient of demanding an immediate vote by the Board members. A look at the Board's crowded agenda for its monthly two-day sessions makes it clear that the proceedings do not involve substantive hearings on individual cases. A state tax court would result in cases more thoroughly considered by judges whose sole responsibility would be resolution of disputes brought before it, with a reduced reliance on staff expertise for final decisions.
- (5) Finally, conformity with the Federal tax litigation process would result in increased efficiency in the decision-making process. Practitioners familiar with Federal tax litigation procedures would be familiar with California procedures. This conformity would reduce costs inherent in a system that requires California specialists focused on varying procedural requirements. The structure could be simplified with a single administrative review of proposed assessments by a hearing officer attached to the Franchise Tax Board or Board of Equalization.<sup>4</sup> Appeals from the tax court, by both parties, could be taken to the Courts of Appeal, thereby unburdening the Superior Court from having to decide tax issues and removing one level of hearing from the process. For parties who prefer a decision in the Superior Court, like the Federal system, taxpayers may be given an option to pay the tax and file a refund suit in Superior Court, which thereafter may be appealed to the Courts of Appeal. I believe that this arrangement would produce a balanced and discoverable body of interpretation of the California tax law that would reduce uncertainty in the application of the Revenue and Tax Code.

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<sup>3</sup> Because the Board of Equalization would maintain its authority mandated in the State Constitution, there is no need for a constitutional amendment to create a tax court as an arm of the Legislature.

<sup>4</sup> This is analogous to the appeals function of the Internal Revenue Service.

Structure of a California Tax Court

Subsequent to my appearance before the Commission, I have given some thought to how I would structure a California tax court. These thoughts are preliminary and require further study, but might be a starting point. Again, the overriding theme is conformity with Federal procedures. Also, I believe that creation of a state tax court would shorten the dispute resolution process by reducing the number of steps taken before a case is resolved. The system would not be duplicative, one level of administrative appeal and the hearing before the Board of Equalization could be eliminated. In addition, this proposal would reduce the need for staff at the Board of Equalization to find facts and draft decisions proposed for Board adoption. Some of the staff might be shifted to staff the tax court. Overall the tax court would create efficiencies in the decision making process that could result in cost savings to the State.

- The court could include five judges, appointed by the Governor and confirmed by the Board of Equalization or the Legislature. The court would be an administrative court formed under the legislative power rather than a court with stature equivalent to the Superior Court.
- The terms of appointment should be from 12 to 15 years.
- Each judge would probably require three law clerks and a secretary. The court also would require a clerks' office and clerical personnel. The total number of people required would be in the range of 50.
- Cases would be heard by a single judge who would make findings and draft an opinion. At the request of the chief judge or some number of the other judges, cases would be decided by the full court.
- The court would develop its own procedures and rules of evidence. Following the lead of the U.S. Tax Court, strict evidentiary rules may not be necessary.
- The court would publish its opinions as deemed by the judges to be significant. Other cases might be decided by unpublished memorandum decision.
- The court might appoint masters to hear small tax cases, cases involving less than \$5,000 of tax deficiency and for which the taxpayer elects a small case procedure. Decisions in small tax cases would be final, with no right to appeal.
- Decisions of the tax court would be appealable to the California Courts of Appeal. The appropriate appellate court might be the District Court of Appeal for the district of the taxpayer's residence, or all appeals could be concentrated in the Third District (Sacramento) which might have one or two judges appointed with some experience in tax matters.
- Appeals would be allowed both to the taxpayer and the Franchise Tax Board.
- Petitions for hearing before the tax court would be filed after an assessment by the Franchise Tax Board becomes final. Taxpayers would not be required to pay the tax before filing with the tax court.
- The administrative procedure before a final assessment could be shortened to include a single appeal before an appeals officer of the Franchise Tax Board or Board of Equalization.
- The tax court jurisdiction would include the individual income tax, the corporate and bank franchise taxes, sales tax disputes, and disputes over other taxes as the Legislature would determine. The list might include all taxes administered by the Board of Equalization. The tax

court might also be empowered to here appeals of local tax assessments following denial by a county board of supervisors.<sup>5</sup>

- An alternative option to the tax court would remain for taxpayers to pay the tax and file a suit for refund in the Superior Court, in which case the taxpayer would forego recourse to the tax court.

In summary, I believe that creation of a tax court for California tax disputes would avoid the conflict that is inherent in combining the executive and policy making roles of the elected members of the State Board of Equalization, and would enhance the efficiency of the tax collection process by conforming dispute resolution with the Federal Income tax system. The stature of the Board of Equalization as the central policy agency for California taxes would be enhanced by removing it from the dispute resolution process.

Respectfully submitted,

Daniel L. Simmons

C: The Honorable Carole Migden, Chair, California Board of Equalization  
The Honorable Bill Leonard, Member California Board of Equalization  
John Warren  
Steven Kamp  
Eric Miethke

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<sup>5</sup> Here I think I might restrict the right to appeal to questions of law, rather than a reassessment of fair market value.

Sunday, April, 25, 2004

## Independent court would help taxpayers

Rebuttal by Tom Harman - Register editorial about AB 2472 contains factual inaccuracies.

**By TOM HARMAN**

State assemblyman, R-Huntington Beach

I am one of the authors of AB 2472 that seeks to establish a California Tax Court. Your editorial about AB 2472 contains factual inaccuracies that I believe has led you to erroneously conclude that AB 2472 is an attempt to unfairly favor the government in its tax collection efforts ["A kangaroo court for taxpayers," Opinion, April 20]. Nothing could be further from the truth.

The purpose of AB 2472 is to level the playing field by giving taxpayers the ability to take their cases before a truly independent tribunal without first having to pay any disputed tax.

Here's how tax appeals currently work in cases involving disputed sales and use taxes. The staff of the State Board of Equalization first audits the taxpayer. If the taxpayer is unhappy with the audit results, the taxpayer can appeal the audit to the five elected members of the BOE. This type of an appeal is inherently unfair because the BOE is the very agency that collects the taxes for the state. The Board of Equalization is *not* a neutral party. If the same type of system were in place federally, taxpayers who were audited by the IRS would be taking their appeal to the commissioner of internal revenue instead of to the United States Tax Court. How fair would that be?

My bill is an attempt to make the system fairer by giving taxpayers the right to appeal to an independent tribunal, the California Tax Court proposed in AB 2472. Such an appeal could be made without having first to pay the disputed tax.

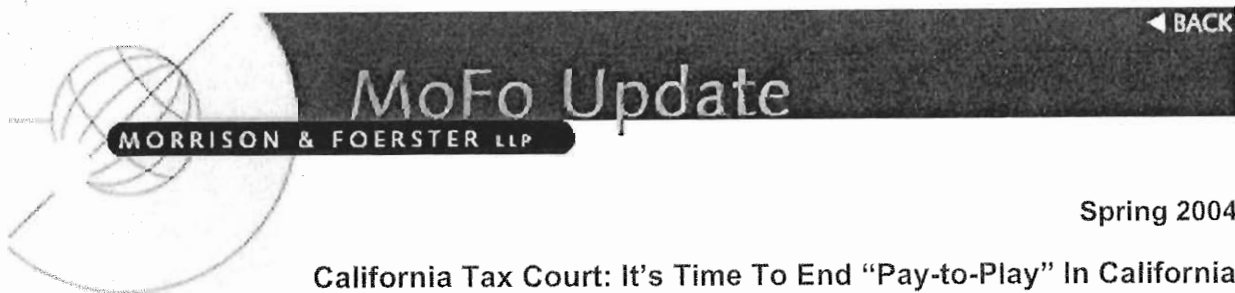
Your editorial says that currently the state may not appeal an adverse decision. This is not exactly correct. Since in sales- and use-tax matters it is the Board of Equalization that makes the final decision, the issue of whether the state can appeal is moot because the BOE would never appeal a decision of its own. Income tax matters, which are regulated by the Franchise Tax Board, are a little more complicated when it comes to the issue of an appeal. For certain technical reasons it would probably be rare for the FTB to appeal, but if it did, then under AB 2472 it would be to an independent tax court. In my view, the benefits of the taxpayer being able to appeal to a truly independent tax court far outweigh the disadvantage of giving FTB the right to appeal adverse decisions.

AB 2472 is patterned after the U.S. Tax Court. In most U.S. Tax Court cases, the issues are simple enough that taxpayers represent themselves. The U.S. court has special rules for these "small tax cases" that include relaxed rules of procedure and evidence, making the court "taxpayer friendly" for small taxpayers. AB 2472 provides for these same rules for "small tax cases." The vast majority of taxpayers will not need attorneys to represent them in the tax court.

Your claim that the taxing agencies will be able to "hammer" the taxpayer by increasing the tax deficiency is a red herring. The tax court rules will allow both taxpayers and the taxing agencies to timely and fairly amend their case to raise new issues. Taxpayers will be given the opportunity not only to contest the tax deficiency proposed by the taxing agencies but also will be able to prove the tax they originally calculated was too high. Conversely, the taxing agencies will be given the opportunity to prove that the tax they determined was too low because of a mistake or new evidence. If the taxing agencies attempt to increase the amount of the deficiency, they will bear the burden of proof, which is a significant hurdle to overcome.

The current system is flawed because the fox - the taxing agencies - is guarding the tax appeal "henhouse." All AB 2472 is trying to do is improve an appeal system that truly calls into question the fairness of the entire California tax system.





Spring 2004

## California Tax Court: It's Time To End "Pay-to-Play" In California

By Paul H. Frankel, Charles J. Moll, William Hays Weissman

State and Local Tax  
Insights -- Spring 2004

*Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.*

In 1992, distinguished UCLA Law School Professor Michael Asimow, an expert on California administrative law, observed in a law review article, "to put it charitably, California's present arrangement for adjudicating tax cases is a patchwork that can only be understood as a series of historical accidents; to put it less charitably, the system is a mess."<sup>[fn1]</sup> Things have not improved in the last 12 years, and California still finds itself in a minority of states that place responsibility for collecting taxes and adjudicating tax disputes in the hands of the same agency.

Indeed, California was ranked among the bottom five states in every category of *CFO Magazine's* annual state tax survey, causing "no state to come near California's dismal ranking."<sup>[fn2]</sup> More specifically, California was rated as being among the "least desirable" when it came to determining the impact of a state's revenue department policies and systems on a company's decision to locate or expand in the state, and "least independent" when rating the independence of the state's administrative appeal process from the audit department.

Taxpayers have two basic concerns when it comes to the adjudication of their tax disputes: they want (1) due process in the form of a fair, impartial tax hearing that is separate from the tax collection function; and (2) the ability to contest alleged deficiencies without the heavy burden of prepaying the tax, a requirement commonly referred to as "pay-to-play." Creating an independent tax adjudication system that does not require taxpayers to "pay-to-play" would go a long way toward improving the perception of California as a fair and decent place to live and do business.

### Where We Are Today

Currently, California taxes are administered and collected by various administrative agencies, including the Franchise Tax Board ("FTB"), the State Board of Equalization ("SBE"), and the Employment Development Department ("EDD"). In general, the FTB administers corporate franchise taxes and income taxes, while the SBE administers sales and use taxes, state-assessed property taxes, and a myriad of other "special" taxes (e.g., cigarette taxes, environmental taxes, fuel taxes, and insurance taxes). The SBE also hears taxpayer appeals of the taxes administered by the FTB. The EDD primarily administers employment taxes. Typically, an aggrieved taxpayer who seeks to appeal a final decision of one of these revenue collection agencies must first pay the tax, and then file a suit for refund in Superior Court. Thus, unlike federal taxpayers and taxpayers in most other states, California taxpayers must pay their tax before having their "day in court" before a tribunal other than the tax collection agency. This is true regardless of the size or propriety of the proposed liability.<sup>[fn3]</sup>

### How We Got To Where We Are Today

To understand where we are today, and why an independent tax court is needed in California, a brief history lesson is helpful. The SBE was created in 1872 to equalize property taxes across the state. At the time it was formed, there were no personal or corporate income taxes, no sales and use taxes, and few specialized taxes. When the Bank and Corporation Franchise Tax Act was originally enacted in 1929, the SBE and the State Controller both sought to

administer the new tax. A compromise was reached whereby a new Franchise Tax Commissioner was to be appointed by the Chairman of the SBE, the State Controller, and the Director of Finance. A similar struggle ensued in 1935, with similar results, when the personal income tax law was enacted. In 1949, the FTB replaced the office of the Franchise Tax Commissioner. The FTB consisted of the same three officers who formerly had the power to appoint the Franchise Tax Commissioner. Since two of those three FTB members also sit on the five-member SBE, the boards overlap.

The rationale behind California's "pay-to-play" system can be traced back at least to the United States Supreme Court's 1870 decision of *Dows v. City of Chicago*.<sup>[fn4]</sup> At the time *Dows* was decided, the states and their municipalities primarily relied upon the payment of property taxes to operate, and did not have the wide variety of income, sales and other taxes that exists today.<sup>[fn5]</sup> The ability of states and municipalities to function with such limited funding sources necessitated that they be able to collect taxes in an orderly manner, even if the taxes were subject to challenge. Thus, the rule that a taxpayer must pay a tax in order to contest it served to protect the state from being paralyzed by taxpayers who might contest assessments, even if the taxpayer was in fact, correct.

In the last 70 years, the complexity of the Revenue and Taxation Code, the size of the assessments at issue, and the general nature of business have changed dramatically. Today, approximately 98 percent of personal and corporate income taxes and sales and use taxes paid to California are self-assessed taxes. The concerns about the uninterrupted operation of government expressed in *Dows* that supported "pay-to-play" no longer apply; today, California simply is not going to collapse if taxpayers with legitimate complaints are able to contest the remaining 2 percent of tax revenues before paying their proposed assessment. The variety of funding sources available to the State further undermines the rationale for "pay-to-play."

Other states have come to realize that this is indeed true. For example, in 1997 then-Massachusetts Revenue Commissioner Mitchell Adams likened his state's "pay-to-play" system as one of "shoot first, ask questions later." The Massachusetts Legislature ended "pay-to-play" in 1999 after recognizing that its tax system was contributing to Massachusetts' bad reputation as a place to do business. Not surprisingly, Massachusetts has not fallen into Boston Harbor, but is alive and functioning well. Other states, such as Tennessee and Florida, have long allowed taxpayers to contest assessments in their civil courts without prepayment if the taxpayer posts a bond. Still others, such as Minnesota, Oregon, and Indiana, provide administrative tax courts that afford prepayment relief. The District of Columbia recently created an independent Office of Administrative Hearings to hear tax appeals from the Office of Tax and Revenue, starting in October 2004. And, of course, the United States government has long recognized the efficacy and reasonableness of allowing prepayment contests before impartial judges in the United States Tax Court ("USTC").

The time has come for California to end the unfair practice of requiring taxpayers to "pay-to-play." California needs an independent tax tribunal, staffed with the necessary expertise, to handle the often complicated tax issues that now face both individuals and businesses across the state.

### **Who Supports the Creation of an Independent Tax Court**

A wide variety of interests support the creation of an independent tax court as a mechanism to ending "pay-to-play." For example, recently the bipartisan California Commission on Tax Policy in the New Economy, established by Governor Davis to review all state tax issues in light of California's changing economy, unanimously endorsed the creation of a California tax court modeled on the USTC. The very first reason cited by the Commission was the lack of a sufficient prepayment procedure to contest assessments; the Commission further noted that most taxpayers could not afford to "pay-to-play" and thus are "stuck with whatever the SBE or its staff decides." <sup>[fn6]</sup> Even the former director



of the Multistate Tax Commission, Gene Corrigan, called California's "pay-to-play" system "simply unfair."

Academics support the idea as well. For example, distinguished University of California, Davis Law School Professor Daniel Simmons, who in 1978 was Chair of the California Commission on Government Reform ("Post Commission") that examined conforming California's tax code to the Internal Revenue Code, supports the creation of the tax court along the lines of the highly successful USTC model.<sup>[fn7]</sup>

And, of course, taxpayers support the notion of a fair, impartial prepayment body for contesting taxes. Where a tax collection agency also adjudicates the tax, the appearance of a lack of independence is imparted to taxpayers who view the agency as both the prosecutor and the judge.

### **Why a Specialized Court for Taxes**

Some have questioned why a specialized court is needed for taxes when there are few, if any, specialized courts for employment and labor law, environmental law, or other similar highly codified "specialty" areas of law.

There are fundamental reasons why the need for a special court for taxes is different from the need for a special court for other areas of the law. First, nearly all citizens and certainly all businesses must deal with the taxing authorities each and every year, at least once if not quarterly for income taxes, at least once but as often as monthly for sales and use tax, not to mention the other taxes that individuals and businesses must pay. To the contrary, a union employee can work for 40 years and never have to interact with the government with regard to labor issues. Given the frequency with which citizens come into contact with government through the taxing authorities, it is important that such contact be seen as professional and fair.

Moreover, and perhaps more importantly, most of California's taxes are based upon self-assessment by taxpayers. Without widespread adherence to this self-assessment system by California's taxpayers, California's taxes would not be administrable, and the system would collapse.

When a dispute arises, it is important that the resolution be seen as fair and impartial to avoid taxpayers abandoning this system. Where the judge is also the prosecutor, the credibility of the decision, even if correct, is undermined. While the staff of the FTB, the SBE, the EDD, and other state agencies all act professionally and do the best job they can, they can make mistakes, and reasonable differences of opinion can arise between those agencies and taxpayers. Who could possibly be against a fair and impartial process for resolving such disputes?

Finally, taxes traditionally have been the province of two professions: attorneys and accountants. Accountants have been able to represent their clients before proceedings with the IRS and in the USTC, as well as before the state agencies and the SBE for many years. However, accountants are barred from representing their clients in the state civil courts, the only independent avenue currently available to taxpayers in California. By creating a tax court modeled after the USTC, accountants (and others, such as enrolled agents) would be able to continue in their traditional role as representatives for their clients in a fair and impartial tax adjudication system. Thus, a tax court would preserve the important relationship that has long existed between taxpayers and their accountants.

### **Why the Criticisms Against a Tax Court Do Not Stand Up To Scrutiny**

There have been a variety of criticisms made about the current proposals for an

independent tax court in California. The first is that this is somehow an attack on the state agencies that currently administer taxes. This is simply untrue. Under the current proposals, no state agency is being abolished or replaced. Indeed, with the exception of appeals from the FTB of personal and corporate income taxes, all other taxes may still be appealed in the same manner as before. The only difference would be that California taxpayers, for the first time, would be afforded the opportunity to seek prepayment review by an independent and impartial tax court judge following the hearing by the collection agency.

Thus, for example, the SBE still will be free to hold hearings on sales and use tax matters, state-assessed property tax matters, and the myriad other taxes that it currently administers, after the creation of an independent tax court. Although some have questioned the efficiency of having five highly paid elected officials all sitting and hearing thousands of cases with tax disputes that average \$1,200, this administrative process is important in resolving disputes and reducing the number of cases to be appealed to the tax court.

Second, some people suggest that the SBE is adequate to handle the task and thus a new adjudicative body is unnecessary. However, taxpayers are only afforded 10 minutes to present their case to the SBE, making it impossible to present a complex factual and legal tax case. As a result, taxpayers must engage in *ex parte* communications with SBE members prior to their hearing to explain their case, even though the representatives may be reluctant to do so. Indeed, there has long been debate about the ethical considerations involved in such *ex parte* contacts.

More importantly, in its present form, the SBE is just not equipped to act as a trial court. Some cases involve complex issues and tens of millions of dollars, cover several tax years, and have thousands of pages of documentary evidence. If the SBE was to provide for full evidentiary hearings, the SBE most likely would be required to hold hearings during most business days of the year. This would make it virtually impossible for SBE members to perform their many other required duties.

Finally, some have questioned whether modeling a California tax court after the USTC would present procedural difficulties for taxpayers or their representatives. For example, some have observed that the USTC procedural rules are lengthy, and that a qualifications test is required of all non-attorneys. True, the USTC rules are lengthy; but they were specifically designed to include sufficient details about the procedures to make them more understandable to taxpayers, not to complicate them. Moreover, as anyone who has practiced before the USTC can attest to, most proceedings in the USTC are conducted in a manner that is quite informal and are generally well-received by taxpayers. The statistics bear this out — over 70 percent of the total cases docketed at the USTC are *pro se* taxpayers.

Moreover, the qualifications test administered by the USTC exists to protect taxpayers by ensuring that their representatives are qualified to practice. This test should pose little concern to tax professionals. At last count, 7,228 non-attorneys have passed this test and were qualified to represent taxpayers before the USTC.

## Conclusion

It is time to end "pay-to-play" in California. Despite the pressure from special interests, such as Capitol insiders, who seek to retain the status quo, California taxpayers need the ability to contest taxes before an independent tribunal that is separate from the tax collection agency, without the heavy burden of prepayment. To preserve the integrity of the self-assessment tax system, taxpayers need and deserve a system that is at least viewed as impartial, where the prosecutor is not also the judge.

Creating an independent tax court modeled on the USTC is one way to provide

the necessary due process and a reasonable prepayment method for challenging tax assessments. The State will not collapse under such a system, and it would only improve the perception of California as a fair and reasonable place in which to live and conduct business. California's taxpayers want a fair shake, not a shakedown, and they deserve no less.

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#### Footnotes

1:Michael Asimow, *Toward A New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. REV. 1067, 1164 n. 334 (1992)

2:Tim Reason, *The 2004 State Tax Survey*, CFO Magazine (January 2004), available at [www.lexis.com](http://www.lexis.com)

3:Two bills, A.B. 2472 (Wolk) and S.B. 1424 (Burton), have been introduced in the California Legislature that would create a California tax court. These bills would set the qualifications for, the term of office of, and the manner in which a judge is appointed to the California Tax Court; allow for an appeal before the California Tax Court in lieu of filing an appeal in the California Superior Court; and provide for a review in the Court of Appeal.


4:78 U.S. 108 (1870).


5:According to Professor Lawrence Friedman, about three-fourths of state revenues were generated from property taxes in the late 1800s. See Lawrence Friedman, *History Of American Law*, 567 (2nd ed. 1985). In contrast, today property taxes only account for about one-third of California's general fund revenues.

6:See California Commission on Tax Policy in the New Economy, *Final Report* (December 2003), at p. 34.

7:Letter from Daniel L. Simmons to the California Comm. on Tax Policy in the New Economy, September 23, 2003, reprinted in California Comm. on Tax Policy in the New Economy, *Final Report*, at pp. 77-83.

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AMENDED IN ASSEMBLY APRIL 12, 2004

AMENDED IN ASSEMBLY APRIL 1, 2004

CALIFORNIA LEGISLATURE—2003–04 REGULAR SESSION

**ASSEMBLY BILL**

**No. 2472**

**Introduced by Assembly Member Wolk**

(Principal coauthor: Senator Burton)

**(Coauthors: Assembly Members Berg, Canciamilla, Harman,  
Richman, and Wiggins)**

February 19, 2004

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An act to amend Sections 6561, 6561.5, 6563, 6565, 12428, 12430, 12431, 19045, 19046, 19047, 19048, 19050, 19301, 19324, 19331, 19332, 19333, 19334, 19335, 19343, 19344, 19345, 19346, 19347, 19350, 19381, 19382, and 19384 of, to add Part 12 (commencing with Section 25150) to Division 2 of, and to repeal Sections 6562, 6564, and 12429 of, the Revenue and Taxation Code, relating to taxation.

LEGISLATIVE COUNSEL'S DIGEST

AB 2472, as amended, Wolk. California Tax Court.

Existing law provides for the establishment of the State Board of Equalization, and prescribes its various powers and duties regarding the administration of property taxes and various excise taxes and its administrative appeals responsibilities with regard to state personal income taxes and bank and corporation taxes. Existing law also provides for the establishment of the Franchise Tax Board and prescribes its various powers and duties regarding the administration of state personal income taxes and corporation taxes.

Existing law provides for the review by the State Board of Equalization of assessments and determinations of tax under the Sales and Use Tax Law and specified provision of the insurance taxation laws, upon a filing of a specified petition by the taxpayer. Under existing law, the Franchise Tax Board reviews its deficiency assessments of personal income taxes and corporation taxes upon the filing of a protest by the taxpayer. The Franchise Tax Board's action upon the protest is subject to appeal by the taxpayer to the State Board of Equalization, which hears and determines the appeal. Existing law provides that a taxpayer, upon payment of the underlying tax assessment, may file a claim for refund with the superior court.

This bill would create the California Tax Court that would replace the State Board of Equalization as the forum that would hear and determine appeals from taxpayers with respect to sales and use tax determinations, specified insurance tax determinations, personal income tax deficiency assessments, and corporation tax deficiency assessments. This bill would prescribe the qualifications for, the term of office of, and the manner in which a judge is appointed to the California Tax Court. This bill would prescribe the procedures to be followed by the California Tax Court with respect to these appeals and would provide that a taxpayer's option to file an appeal with the California Tax Court would be in lieu of filing an appeal in the California Superior Court. This bill would further provide that, within 90 days of the date a determination by the California Tax Court becomes final, a taxpayer or the applicable state agency may ~~appeal~~ *file a petition for a writ of extraordinary relief with the Court of Appeal for a review of the determination of the California Tax Court to the Court of Appeal.*

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

*The people of the State of California do enact as follows:*

- 1 SECTION 1. (a) The Legislature finds and declares all of
- 2 the following:
- 3 (1) In order to increase public confidence in the fairness of the
- 4 California's tax system, the state should provide an independent
- 5 entity to resolve disputes between state taxing agencies and
- 6 taxpayers.
- 7 (2) By establishing an independent tax court, the Legislature
- 8 would provide California's taxpayers with a means of resolving

1 controversies that ensures the basic elements of due process and  
2 fairness are met.

3 (b) It is the intent of the Legislature to create a tax court that will  
4 ensure fair and equal treatment for similarly situated taxpayers,  
5 and to provide a legal forum for resolution of tax disputes that are  
6 consistent with federal tax resolution procedures.

7 SEC. 2. Section 6561 of the Revenue and Taxation Code is  
8 amended to read:

9 6561. Any person against whom a determination is made  
10 under Article 2 (commencing with Section 6481) or 3  
11 (commencing with Section 6511) or any person directly interested  
12 may petition for a redetermination with the California Tax Court  
13 within 90 days after service upon the person of notice thereof. If  
14 a petition for redetermination is not filed within the 90-day period,  
15 the determination becomes final at the expiration of that period.

16 SEC. 3. Section 6561.5 of the Revenue and Taxation Code is  
17 amended to read:

18 6561.5. Every petition for redetermination shall be in writing  
19 and shall state the specific grounds upon which the petition is  
20 founded.

21 SEC. 4. Section 6562 of the Revenue and Taxation Code is  
22 repealed.

23 SEC. 5. Section 6563 of the Revenue and Taxation Code is  
24 amended to read:

25 6563. The California Tax Court may decrease or increase the  
26 amount of the determination before it becomes final, but the  
27 amount may be increased only if a claim for the increase is asserted  
28 by the board at or before the hearing.

29 SEC. 6. Section 6564 of the Revenue and Taxation Code is  
30 repealed.

31 SEC. 7. Section 6565 of the Revenue and Taxation Code is  
32 amended to read:

33 6565. (a) All determinations made by the board under Article  
34 2 (commencing with Section 6481) or Article 3 (commencing with  
35 Section 6511) are due and payable at the time they become final.

36 (b) All determinations made pursuant to a decision issued by  
37 the California Tax Court are due and payable at the time they  
38 become final.

1 (c) If any determination is not paid when due and payable, a  
2 penalty of 10 per cent of the amount of the determination,  
3 exclusive of interest and penalties, shall be added thereto.

4 SEC. 8. Section 12428 of the Revenue and Taxation Code is  
5 amended to read:

6 12428. (a) An insurer or surplus line broker against whom a  
7 deficiency assessment is made under Section 12424 or 12425 may  
8 petition for redetermination of the deficiency assessment within  
9 90 days after service upon the insurer or surplus line broker of the  
10 notice thereof, by a written petition with the California Tax Court,  
11 with a copy to the commissioner, setting forth the grounds of  
12 objection to the deficiency assessment and the correction sought.

13 (b) If a petition for redetermination is not filed within the  
14 90-day period prescribed by this section, the deficiency  
15 assessment becomes final and due and payable at the expiration of  
16 that 90-day period.

17 SEC. 9. Section 12429 of the Revenue and Taxation Code is  
18 repealed.

19 SEC. 10. Section 12430 of the Revenue and Taxation Code is  
20 amended to read:

21 12430. The California Tax Court, in the exercise of its  
22 discretion, may decrease or increase the amount of the deficiency  
23 assessment before the decision issued by the California Tax Court  
24 becomes final, but the amount may be increased only if a claim for  
25 the increase is asserted by the commissioner or the board at or  
26 before the hearing.

27 SEC. 11. Section 12431 of the Revenue and Taxation Code is  
28 amended to read:

29 12431. (a) The decision of the California Tax Court upon a  
30 petition for redetermination of a deficiency assessment becomes  
31 final 90 days after service on the insurer or surplus line broker, as  
32 applicable, and the commissioner of the notice of the decision of  
33 the California Tax Court.

34 (b) All determinations made by the California Tax Court are  
35 due and payable at the time the decision becomes final.

36 SEC. 12. Section 19045 of the Revenue and Taxation Code is  
37 amended to read:

38 19045. The Franchise Tax Board's action upon the protest,  
39 whether in whole or in part, is final upon the expiration of 90 days  
40 from the date when it mails notice of its action to the taxpayer,



1 unless within that 90-day period the taxpayer appeals in writing  
2 from the action of the Franchise Tax Board to the California Tax  
3 Court.

4 SEC. 13. Section 19046 of the Revenue and Taxation Code is  
5 amended to read:

6 19046. Two copies of the appeal and two copies of any  
7 supporting documents shall be addressed and mailed to the  
8 California Tax Court. Upon receipt of the appeal, the California  
9 Tax Court shall provide one copy of the appeal and one copy of any  
10 supporting documents to the Franchise Tax Board at Sacramento,  
11 California.

12 SEC. 14. Section 19047 of the Revenue and Taxation Code is  
13 amended to read:

14 19047. The California Tax Court shall hear and determine the  
15 appeal and thereafter shall issue its decision to the taxpayer and the  
16 Franchise Tax Board of its determination and the reasons therefor.

17 SEC. 15. Section 19048 of the Revenue and Taxation Code is  
18 amended to read:

19 19048. The decision of the California Tax Court becomes  
20 final upon the expiration of 90 days from the time of the  
21 determination.

22 SEC. 16. Section 19050 of the Revenue and Taxation Code is  
23 amended to read:

24 19050. A certificate by the Franchise Tax Board of the  
25 mailing of the notices specified in this article, or a copy of the  
26 decision issued by the California Tax Court, as applicable, is prima  
27 facie evidence of the assessment of the deficiency and of the giving  
28 of the notices.

29 SEC. 17. Section 19301 of the Revenue and Taxation Code is  
30 amended to read:

31 19301. (a) If the Franchise Tax Board or the California Tax  
32 Court, as the case may be, finds that there has been an overpayment  
33 of any liability imposed under Part 10 (commencing with Section  
34 17001), Part 11 (commencing with Section 23001), or this part by  
35 a taxpayer for any year for any reason, the amount of the  
36 overpayment may be credited against any amount then due from  
37 the taxpayer and the balance shall be refunded to the taxpayer.

38 (b) In the case of a joint return filed under Section 18521, the  
39 amount of the overpayment may be credited against the amount

1 then due from both taxpayers and the balance shall be refunded to  
2 both taxpayers in the names under which the return was paid.

3 (c) In the case of a corporation, the balance shall be refunded  
4 to the taxpayer or its successor through reorganization, merger, or  
5 consolidation, or to its shareholders upon dissolution.

6 SEC. 18. Section 19324 of the Revenue and Taxation Code is  
7 amended to read:

8 19324. (a) Except as provided in subdivision (b), at the  
9 expiration of 90 days from the mailing of the notice, the Franchise  
10 Tax Board's action upon the claim is final unless within the 90-day  
11 period the taxpayer appeals in writing from the action of the  
12 Franchise Tax Board to the California Tax Court.

13 (b) If within the period set forth in Section 19384 for filing a  
14 suit for refund the Franchise Tax Board receives information that  
15 it determines clearly establishes that a disallowed claim should  
16 have been allowed, in whole or in part, the Franchise Tax Board  
17 shall credit the amount of the overpayment against any taxes due  
18 from the taxpayer under this part and the balance shall be refunded  
19 to the taxpayer.

20 SEC. 19. Section 19331 of the Revenue and Taxation Code is  
21 amended to read:

22 19331. If the Franchise Tax Board fails to mail notice of  
23 action on any refund claim within six months after the claim is  
24 filed, the taxpayer may prior to mailing of notice of action on the  
25 refund claim consider the claim disallowed and appeal to the  
26 California Tax Court. For substitution of the 120-day period for the  
27 six-month period contained in this section in a Title 11 case, see  
28 Section 505(a)(2) of Title 11 of the United States Code.

29 SEC. 20. Section 19332 of the Revenue and Taxation Code is  
30 amended to read:

31 19332. Two copies of the appeal and two copies of any  
32 supporting documents shall be addressed and mailed to the  
33 California Tax Court. Upon receipt of the appeal, the California  
34 Tax Court shall provide one copy of the appeal and one copy of any  
35 supporting documents to the Franchise Tax Board at Sacramento,  
36 California.

37 SEC. 21. Section 19333 of the Revenue and Taxation Code is  
38 amended to read:

1 19333. The California Tax Court shall hear and determine the  
2 appeal and thereafter shall issue its decision to the taxpayer and the  
3 Franchise Tax Board of its determination and the reasons therefor.

4 SEC. 22. Section 19334 of the Revenue and Taxation Code is  
5 amended to read:

6 19334. The determination of the California Tax Court is final  
7 upon the expiration of 90 days from the date of the determination  
8 unless within the 90-day period, the taxpayer or Franchise Tax  
9 Board files a petition for rehearing with the California Tax Court.  
10 In that event the determination becomes final upon the expiration  
11 of 90 days from the date the California Tax Court issues its opinion  
12 on the petition.

13 SEC. 23. Section 19335 of the Revenue and Taxation Code is  
14 amended to read:

15 19335. If, with or after the filing of a protest or an appeal with  
16 the California Tax Court, a taxpayer pays the tax protested before  
17 the Franchise Tax Board acts upon the protest, or the California  
18 Tax Court upon the appeal, the Franchise Tax Board or California  
19 Tax Court, as applicable, shall treat the protest or the appeal as a  
20 claim for refund or an appeal from the denial of a claim for refund  
21 filed under this article.

22 SEC. 24. Section 19343 of the Revenue and Taxation Code is  
23 amended to read:

24 19343. At the expiration of 90 days from the mailing of the  
25 notice specified in Section 19342, the Franchise Tax Board's  
26 action upon the disallowance of the interest shall be final unless  
27 within the 90-day period, the taxpayer appeals in writing from the  
28 action of the Franchise Tax Board to the California Tax Court.

29 SEC. 25. Section 19344 of the Revenue and Taxation Code is  
30 amended to read:

31 19344. Two copies of the appeal and two copies of any  
32 supporting documents shall be addressed and mailed to the  
33 California Tax Court. Upon receipt of the appeal, the California  
34 Tax Court shall provide one copy of the appeal and one copy of any  
35 supporting documents to the Franchise Tax Board at Sacramento,  
36 California.

37 SEC. 26. Section 19345 of the Revenue and Taxation Code is  
38 amended to read:

1 19345. The California Tax Court shall hear and determine the  
2 appeal and thereafter shall issue its decision to the taxpayer and the  
3 Franchise Tax Board of its determination and the reasons therefor.

4 SEC. 27. Section 19346 of the Revenue and Taxation Code is  
5 amended to read:

6 19346. The determination is final upon the expiration of 90  
7 days from the date of the determination unless within the 90-day  
8 period, the taxpayer or Franchise Tax Board files a petition with  
9 the California Tax Court. In that event the determination becomes  
10 final upon the expiration of 90 days from the date the California  
11 Tax Court issues its decision with respect to the petition.

12 SEC. 28. Section 19347 of the Revenue and Taxation Code is  
13 amended to read:

14 19347. Within 90 days after the mailing of the notice of the  
15 Franchise Tax Board's action disallowing interest upon any refund  
16 claim, the taxpayer, in lieu of filing an appeal with the California  
17 Tax Court as authorized pursuant to Section 19343, may bring an  
18 action against the Franchise Tax Board on the grounds set forth for  
19 interest in the claim for the recovery of the interest.

20 SEC. 29. Section 19350 of the Revenue and Taxation Code is  
21 amended to read:

22 19350. If a credit or refund of any part of an overpayment  
23 would be barred under Section 19306, except for Section 19312,  
24 no interest shall be allowed or paid with respect to that part of the  
25 overpayment for any period beginning after the expiration of the  
26 period of limitation provided in Section 19306 for filing claim for  
27 credit or refund of that part of the overpayment and ending at the  
28 expiration of six months after the date on which the claim was filed  
29 or, in case no claim was filed and the overpayment was found by  
30 the California Tax Court, ending at the time the appeal was filed  
31 with the California Tax Court.

32 SEC. 30. Section 19381 of the Revenue and Taxation Code is  
33 amended to read:

34 19381. (a) Except as provided in subdivision (b), no  
35 injunction or writ of mandate or other legal or equitable process  
36 shall issue in any suit, action, or proceeding in any court against  
37 this state or against any officer of this state to prevent or enjoin the  
38 assessment or collection of any tax under this part.

39 (b) No tax based solely upon the alleged residence in this state  
40 of an individual shall be collected from that individual until 90

1 days after the action of the California Tax Court becomes final and,  
2 if he or she files an appeal with the Court of Appeal, during the  
3 pendency of the action, other than by way of or under the jeopardy  
4 assessment provisions of this part.

5 SEC. 31. Section 19382 of the Revenue and Taxation Code is  
6 amended to read:

7 19382. (a) Except as provided in Section 19385, after  
8 payment of the tax and denial by the Franchise Tax Board of a  
9 claim for refund, any taxpayer claiming that the tax computed and  
10 assessed is void in whole or in part may bring an action, upon the  
11 grounds set forth in that claim for refund, against the Franchise Tax  
12 Board for the recovery of the whole or any part of the amount paid.

13 (b) This section does not apply to a claim for refund that is  
14 based upon an appeal of a determination or action by the Franchise  
15 Tax Board that was appealed to, and adjudicated by, the California  
16 Tax Court.

17 SEC. 32. Section 19384 of the Revenue and Taxation Code is  
18 amended to read:

19 19384. The action provided by Section 19382 shall be filed  
20 within four years from the last date prescribed for filing the return  
21 or within one year from the date the tax was paid, or within 90 days  
22 after notice of action by the Franchise Tax Board upon any claim  
23 for refund.

24 SEC. 33. Part 12 (commencing with Section 25150) is added  
25 to Division 2 of the Revenue and Taxation Code, to read:

26  
27 PART 12. CALIFORNIA TAX COURT

28  
29 CHAPTER 1. GENERAL PROVISIONS

30  
31 25150. This act hereby creates the California Tax Court that  
32 is separate from and independent of the Franchise Tax Board and  
33 the State Board of Equalization.

34 25151. The California Tax Court is vested with the powers  
35 and duties, as prescribed by this act, that are necessary to conduct  
36 de novo administrative review of specified administrative  
37 determinations made by the Franchise Tax Board and the State  
38 Board of Equalization.

1 25152. (a) The California Tax Court shall be composed of  
2 five judges appointed by the Governor, subject to the confirmation  
3 of the Senate.

4 (b) The terms of the judges shall be 12 years, except that the  
5 members initially appointed to the California Tax Court shall serve  
6 terms of 4, 6, 8, 10, and 12 years, respectively, as appointed by the  
7 Governor.

8 (c) Each judge shall be selected on the basis of his or her  
9 qualifications, knowledge, and experience with regard to the  
10 administration and application of the tax laws of this state and of  
11 the United States.

12 (d) Once appointed and confirmed, each judge shall continue  
13 in office until his or her term expires and until a successor has been  
14 appointed and confirmed.

15 (e) Each judge shall be bound to the code of judicial ethics that  
16 apply to judges serving in the California courts.

17 (f) Vacancies in the California Tax Court that occur, other than  
18 by the expiration of a term, shall be filled for the unexpired term  
19 by the Governor, subject to the confirmation of the Senate.

20 (g) The Governor may remove a judge after notice and an  
21 opportunity to be heard, for neglect of duty, inability to perform  
22 duties, malfeasance in office, or for other good cause.

23 25153. (a) A candidate for a judge of the California Tax  
24 Court shall meet all of the following requirements:

25 (1) The candidate shall be a citizen of the United States.

26 (2) The candidate shall be a resident of the State of California.

27 (3) The candidate shall be licensed as an attorney, and for at  
28 least five of the 10 years preceding his or her appointment, shall  
29 have engaged in the active practice of law, governmental or  
30 private, with a primary focus on taxation.

31 (4) The candidate shall meet any qualification that a judge of  
32 a superior court is required to meet, except for a residency  
33 qualification that is different from the residency requirement set  
34 forth in paragraph (2).

35 (b) Before entering upon the duties of office, each judge shall  
36 take and subscribe to an oath or affirmation that he or she will  
37 faithfully discharge the duties of the office, and that oath shall be  
38 filed in the office of the Secretary of State.

39 (c) Each judge shall devote his or her full time during business  
40 hours to the duties of his or her office.

(d) No person, while serving as a judge with the California Tax Court, shall engage in the practice of law or other gainful employment or business, nor hold another office or position of profit under this state, any other state, or the United States.

25154. Once every two years the judges shall elect a Chief Judge, with the approval of a majority of the judges, who shall serve as the executive director of the California Tax Court and shall have sole charge of the administration of the California Tax Court.

25155. Each judge shall receive compensation on the same terms and at the same rate as judges serving in the superior courts of this state.

25156. (a) The principal office of the California Tax Court Tax shall be located in Sacramento, California.

(b) The California Tax Court shall conduct hearings at its principal office. The California Tax Court may also hold hearings at any place within the state, as assigned by the Chief Judge, with a view to securing to taxpayers a reasonable opportunity to appear before the California Tax Court with as little inconvenience and expense as practicable.

(c) The state shall provide courtrooms, chambers, and offices for the California Tax Court in Sacramento and shall arrange for courtrooms, chambers, and offices or other appropriate facilities when hearings are held elsewhere.

25157. The California Tax Court is authorized to promulgate and adopt all reasonable rules and forms as may be necessary to carry out the intent and purpose of this act.

~~25158. The California Tax Court is authorized to establish a streamlined hearing process for tax deficiencies and claimed refunds that are not in excess of ten thousand dollars (\$10,000), exclusive of penalties and interest.~~

## CHAPTER 2. HEARINGS

### *Article 1. General Rules of Application*

25165. (a) Proceedings before the California Tax Court shall be a full evidentiary hearing and may not be restricted to the record of the proceedings before the Franchise Tax Board, State Board of Equalization, or the Insurance Commissioner, as applicable.

1 (b) (1) Except as provided in paragraph (2), all hearings shall  
2 be open to the public and shall be conducted in accordance with the  
3 rules of practice and procedure as the California Tax Court may  
4 promulgate by regulation.

5 (2) Notwithstanding the foregoing, on motion of either party,  
6 the California Tax Court shall exclude information from the public  
7 if the party opposing disclosure of that information shows good  
8 cause as to why that information should remain confidential.

9 ~~25166. (a) The California Tax Court is not bound by the rules~~  
10 ~~of evidence as applied in civil cases in the courts of this state.~~

11 ~~(b) The California Tax Court shall admit relevant evidence if~~  
12 ~~it is probative of a material fact in controversy.~~

13 ~~(c) (1) Subject to the provisions of paragraph (2), hearsay~~  
14 ~~evidence shall be admissible if it is the kind of evidence on which~~  
15 ~~reasonable persons customarily rely in the course of serious~~  
16 ~~affairs.~~

17 ~~(2) The rules of privilege that are recognized and applied by the~~  
18 ~~laws of this state shall apply.~~

19 ~~(d) provisions of the Evidence Code shall apply to all~~  
20 ~~evidentiary hearings before the California Tax Court.~~

21 (b) Oral evidence may be taken only on oath or affirmation.

22 ~~(e)~~

23 (c) In the case of an issue of fact, the taxpayer shall have the  
24 burden of persuasion by a preponderance of the evidence in the  
25 record, except that the Franchise Tax Board, State Board of  
26 Equalization, or the Insurance Commissioner, as applicable, shall  
27 have the burden of persuasion in the case of an assertion of fraud  
28 and in other cases provided by law.

29 25167. (a) The taxpayer may be represented by any of the  
30 following in a proceeding before the California Tax Court:

31 (1) The taxpayer or the taxpayer's spouse.

32 (2) An attorney admitted to practice before the California Tax  
33 Court.

34 (3) A participant in a law school tax clinic that is accredited by  
35 the California Tax Court.

36 (4) Any person that is licensed by the United States Department  
37 of the Treasury to represent taxpayers before all administrative  
38 levels of the Internal Revenue Service and that meets either of the  
39 following requirements:



1 (A) That person has satisfied the requirements for admission to  
2 practice before the California Tax Court, as specified in the  
3 California Tax Court Rules of Practice and Procedure.

4 (B) That person is admitted to practice before the United States  
5 Tax Court as of the date that the taxpayer files a petition with the  
6 California Tax Court.

7 (5) Any other person authorized under the rules of practice and  
8 procedure as promulgated by the California Tax Court.

9 (b) The Franchise Tax Board, State Board of Equalization, or  
10 Department of Insurance, as applicable, may be represented by any  
11 of the following in a proceeding before the California Tax Court:

12 (1) The agency's chief counsel.

13 (2) A member of the agency's legal staff.

14 (3) The Department of Justice.

15 25170. (a) The California Tax Court shall issue its decision  
16 after a hearing, within six months after the submission of briefs  
17 subsequent to completion of the hearing or, if briefs are not  
18 submitted, then within six months after completion of the hearing.  
19 The California Tax Court may extend the six-month period, for  
20 good cause shown, up to three additional months.

21 25171. (a) The California Tax Court shall issue its decision  
22 in writing, including a concise statement of the facts found and the  
23 conclusions of law reached. The California Tax Court's order  
24 shall, subject to law, grant that relief, invoke those remedies, and  
25 issue those orders as it deems appropriate to carry out its decision.

26 (b) If a decision is certified for publication in accordance with  
27 subdivision (b) of Section 25172, the California Tax Court's  
28 interpretation of a taxing statute subject to contest in one  
29 proceeding shall be followed by the California Tax Court in all  
30 future proceedings, and its application of a taxing statute to  
31 particular facts shall be followed by the California Tax Court in all  
32 future proceedings involving similar facts, unless the California  
33 Tax Court's interpretation or application conflicts with that of an  
34 appellate court.

35 (c) The California Tax Court's decision shall have the same  
36 effect, and shall be enforced in the same manner, as a judgment of  
37 a superior court of this state.

38 25172. (a) Except as provided in subdivision (b), the final  
39 decision of the California Tax Court is not certified for publication.

1 (b) The Chief Judge, subject to approval of the majority of the  
2 judges of the California Tax Court, may designate a final decision  
3 as a certified decision for publication.

4 (c) The California Tax Court shall provide for the publication  
5 of its certified final decisions in the form it deems best adapted for  
6 public convenience. These publications shall be made  
7 permanently available and constitute the certified decisions of the  
8 California Tax Court.

9 (d) (1) All final decisions should be made available for public  
10 review.

11 (2) All evidence and transcription of the hearings conducted by  
12 the California Tax Court shall be available for public review with  
13 the exception of the following:

14 (A) Any evidence or transcription that applies to trade secrets  
15 or other confidential information.

16 (B) Any evidence or transcription that the California Tax  
17 Court, upon motion of a party to the proceeding, has withdrawn  
18 from public record.

19 25173. (a) Except as provided in subdivision (b), the  
20 decision of a California Tax Court judge that conducted the  
21 hearing is not subject to approval by the remaining members of the  
22 California Tax Court.

23 (b) The Chief Judge of the California Tax Court, in his or her  
24 sole discretion, or in the alternative, a majority of the California  
25 Tax Court judges, may determine that the decision of one of the  
26 California Tax Court judges should be decided by the entire  
27 California Tax Court.

28 25180. (a) A taxpayer or the Franchise Tax Board, the State  
29 Board of Equalization, or the Insurance Commissioner, as  
30 applicable, may file an appeal with the California Tax Court for a  
31 reconsideration of its decision within the 90-day period following  
32 the California Tax Court's issuance of its decision.

33 (b) (1) Except as provided in paragraph (2), the California Tax  
34 Court may set a time, date, and place for hearing the appeal and  
35 shall notify the taxpayer, the Franchise Tax Board, the State Board  
36 of Equalization, or the Insurance Commissioner, as applicable, not  
37 less than 60 days in advance of the date of the hearing.

38 (2) The California Tax Court, in its discretion, may take any  
39 other action as it may deem appropriate in lieu of hearing an  
40 appeal, including, but not limited to, summary reversal,

1 depublication of a decision certified for publication, or a summary  
2 affirmance of the decision.

3 (c) If a hearing on an appeal is scheduled, the California Tax  
4 Court shall hear and issue a decision on the appeal and shall  
5 thereafter notify the taxpayer and the Franchise Tax Board, the  
6 State Board of Equalization, or the Insurance Commissioner, as  
7 applicable, of its determination and the reasons therefor.

8 (d) If the California Tax Court does not grant an appeal of its  
9 decision, it shall notify the taxpayer and the Franchise Tax Board,  
10 the State Board of Equalization, or the Insurance Commissioner,  
11 as applicable, of its determination and the reasons therefor.

12 25182. (a) The decision of the California Tax Court, or in the  
13 case of an appeal of a decision of the California Tax Court, the  
14 action on the appeal, becomes final 90 days following the issuance  
15 to the taxpayer and the Franchise Tax Board, the State Board of  
16 Equalization, or the Insurance Commissioner, as applicable, of the  
17 decision unless either the taxpayer or the Franchise Tax Board, the  
18 State Board of Equalization, or the Insurance Commissioner, as  
19 applicable files a notice of appeal within the 90-day period with the  
20 Court of Appeal for the appellate judicial district in which the  
21 appeal has arisen. *applicable, files a petition within that 90-day*  
22 *period for a writ of extraordinary relief with the Court of Appeal*  
23 *for the appellate judicial district in which the proceeding*  
24 *originally arose.*

25 (b) The standard of judicial review to be applied by any  
26 reviewing court shall be the substantial evidence test, defined and  
27 applied as follows:

28 ~~(1) If the determination by the California Tax Court is not fairly~~  
29 ~~supported by the evidence in the record considered as a whole, the~~

30 *(1) If the findings of the California Tax Court, with respect to*  
31 *questions of fact, are not supported by substantial evidence on the*  
32 *record considered as a whole, the reviewing court may apply its*  
33 *independent judgment in reviewing the findings of fact.*

34 (2) The court shall also use its independent judgment in  
35 reviewing questions of law and mixed questions of law and fact.

36 (c) *The Judicial Council shall adopt rules to implement this*  
37 *section, including rules concerning the form and content of*  
38 *exhibits to the petition and the form and time for filing an answer*  
39 *to the petition and any reply to the answer.*

1     25183. The final action of the California Tax Court shall be  
2 considered res judicata with respect to any original action on a  
3 claim for refund filed in a superior court in this state.

4

5                     Article 2. *Optional Hearings*

6

7     21590. (a) A taxpayer may, with the concurrence of the  
8 California Tax Court, elect to have the taxpayer's petition for  
9 redetermination heard in accordance with the provisions of this  
10 article if the total amount of the disputed deficiency, or the amount  
11 of the claimed overpayment, as applicable, is not in excess of the  
12 following:

13     (1) In the case of a petition for redetermination of the taxes  
14 imposed under either the Personal Income Tax Law (Part 10  
15 (commencing with Section 17001)) or the Corporation Tax Law  
16 (Part II (commencing with Section 23101)), fifty thousand dollars  
17 (\$50,000) for any income year.

18     (2) In the case of a petition for redetermination of the taxes  
19 imposed under the Sales and Use Tax Law (Part 1 (commencing  
20 with Section 6001)), the Bradley-Burns Uniform Local Sales and  
21 Use Tax Law (Part 1.5 (commencing with Section 7200)), or the  
22 Transactions and Use Tax Law (Part 1.6 (commencing with  
23 Section 7251)), twelve thousand five hundred dollars (\$12,500) for  
24 any quarter.

25     (3) In the case of a petition for a redetermination of the taxes  
26 imposed on insurance gross receipts (Part 7 (commencing with  
27 Section 12001)), fifty thousand dollars (\$50,000) for any calendar  
28 year.

29     (b) For purposes of this section, the total amount of the  
30 disputed deficiency or the amount of any claimed overpayment  
31 placed in dispute includes additions to the tax, additional  
32 amounts, and penalties.

33     21591. Notwithstanding the provisions of subdivision (a) of  
34 Section 25166, any hearing conducted pursuant to this article  
35 shall be conducted in accordance with such rules of evidence,  
36 practice, and procedure as the California Tax Court may  
37 prescribe.

38     25192. The jurisdiction of the California Tax Court is limited  
39 to the amounts set forth in subdivision (a) of Section 25190, and

1 the California Tax Court is precluded from entering a decision with  
2 respect to a redetermination that is in excess of those amounts.

3 25193. (a) At any time before a decision of a hearing  
4 conducted pursuant to this article becomes final, either party may  
5 request any further proceedings on the petition for  
6 redetermination, in accordance with this article, be discontinued.

7 (b) The California Tax Court may grant the request for  
8 discontinuance if it makes both of the following findings:

9 (1) There are reasonable grounds for believing that the amount  
10 of the deficiency placed in dispute, or the amount of an  
11 overpayment, exceeds the applicable jurisdictional amount  
12 described in subdivision (a) of Section 21590.

13 (2) The amount of the excess deficiency or overpayment that is  
14 in dispute is large enough to justify granting the request, and to  
15 discontinue further proceedings in accordance with this article.

16 (c) If the California Tax Court grants a request for  
17 discontinuance pursuant to this article, the hearing on the request  
18 for redetermination shall be conducted in accordance with the  
19 provisions of Article 1 (commencing with Section 25165).

20 21594. At any time before a decision entered in a case in which  
21 the proceedings are conducted under this article becomes final,  
22 either party may request that further proceedings under this article  
23 in that case be discontinued.

24 21595. For purposes of this article, all of the following apply:

25 (a) A decision, together with a brief summary of the reasons  
26 therefor, in any proceeding conducted pursuant to this article shall  
27 satisfy the requirements of Section 25170.

28 (b) A decision of the California Tax Court in any case that is  
29 heard pursuant to this article may not be reviewed in any other  
30 court.

31 (c) A decision of the California Tax Court in any case that is  
32 heard pursuant to this article may not be cited as precedent.



# **AB 2472 (Wolk) California Tax Court**

## **SUPPORT**

**California Tax Reform Association**

**California Labor Federation**

**California Bankers Association**

**California School Employees Association**

**Service Employees International Union**

**California Society of Enrolled Agents**

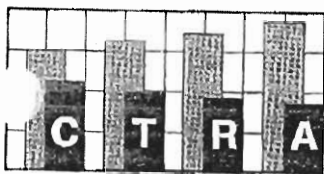
**California Federation of Teachers**

**California Nurses Association**

**Genentech**

**California State Bar Association, Taxation Section**

**William Weintraub, Chair, Los Angeles County State Bar Association, Tax Section**

**California Tax Reform Association**

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March 26, 2004

The Honorable Lois Wolk  
State Capitol, Room 6012  
Sacramento, CA 95814

Dear Assemblymember Wolk:

The California Tax Reform Association (CTRA) is in **STRONG SUPPORT** of your bill AB 2472, which would establish a state tax court.

We believe a state tax court would greatly improve the current process for resolving tax disputes. The California Commission on Tax Policy in the New Economy, a diverse panel appointed by Governor Davis to recommend solutions to the state's tax system, strongly recommended that the state establish a state tax court. It was one of few policy recommendations that drew a unanimous vote of the commission.

The current system, as administered by the Board of Equalization, does not provide a fair, reliable, or efficient means of resolving tax disputes. They follow neither rules of court nor procedure, provide little in the way of guidance or precedent for decisions, and do not necessarily afford full and fair hearings for taxpayers. As elected political officers who perform regulatory, policy and administrative functions, their roles often conflict with the impartial adjudicatory function required of a tax court. On appeals, cases are then retried in local superior courts, even though they often are of statewide concern.

It is indicative that very few states, if any, have the complex and overlapping functions which California's system has. Creation of an adjudicatory system through a tax court is one area in which a broad range of taxpayers, from differing political perspectives, can agree.

Please do not hesitate to contact me at (916) 446-4300 if you have any questions or comments about our position.

Sincerely,

Lenny Goldberg  
Legislative Advocate

CC: Assembly Revenue and Taxation Committee, Assembly Judiciary Committee







# California Labor Federation | AFL-CIO

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Alejandro Stephens, SEIU  
Dan Terry, CPF  
Dean Tipps, SEIU  
Leo Valenzuela, LIUNA  
Cristina Vazquez, UNITE  
William Waggoner, IUOE  
Nancy Wohlforth, OPEIU  
Hard Zampa, OSIW  
erry Zimmerman, IBEW

April 7, 2004

Assemblyman Rudy Bermudez  
Chair, Assembly Revenue and Taxation Committee  
State Capitol, Room 5135  
Sacramento, CA 95814

RE: **AB 2472 (Wolk) – SUPPORT**

Dear Assemblyman Bermudez:

The California Labor Federation, AFL-CIO, supports AB 2472 (Wolk), which would create the California Tax court to become the forum to hear and determine appeals from taxpayers with respect to certain tax determinations and assessments.

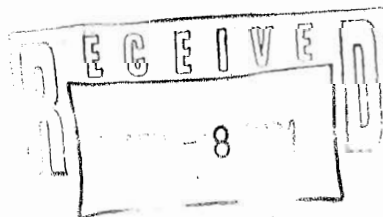
We urge you to vote "YES" on AB 2474 (Wolk) when it come before you in the Assembly Revenue and Taxation Committee on Monday, April 12, 2004.

Sincerely,

Angie Wei  
Legislative Director

PC: sm  
OPEIU 3 AFL CIO (31)

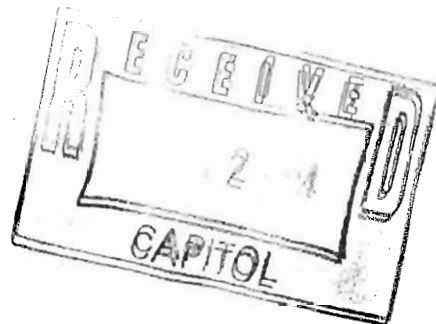
Cc: Committee Members  
Assemblywoman Lois Wolk





## CALIFORNIA SOCIETY OF ENROLLED AGENTS

*Executive Offices:*  
3200 Ramos Circle  
Sacramento, CA 95827-2513  
(916) 366-6646  
Fax (916) 366-6674  
Email: [info@csea.org](mailto:info@csea.org)  
[www.csea.org](http://www.csea.org)



April 8, 2004

The Honorable Ellen Corbett, Chair  
Assembly Judiciary Committee  
State Capitol, Room 4126  
Sacramento, CA 95814

**RE: AB 2472, (WOLK), CALIFORNIA TAX COURT - SUPPORT**  
Hearing Date: April 13, 2004

Dear Chairperson Corbett:

On April 13, 2004, the Assembly Revenue and Taxation Committee is scheduled to consider AB 2472 (Wolk). On behalf of the Members of the California Society of Enrolled Agents, we urge you to support this legislation.

The California Society of Enrolled Agents (CSEA) is a voluntary professional membership association for Enrolled Agents. Enrolled Agents are tax practitioners licensed by the U.S. Department of the Treasury to represent taxpayers before all administrative levels of the Internal Revenue Service (IRS) and state taxing authorities.

The Society believes that establishing a California Tax Court as outlined in AB 2472 would provide a forum for: consistent interpretation of tax law, establishing case precedents, and most importantly, equitable treatment of similarly situated taxpayers.

Furthermore, the Members of CSEA look forward to the ability to represent their clients before the California Tax Court, as Enrolled Agents are currently afforded the right to represent their clients before the Board of Equalization.

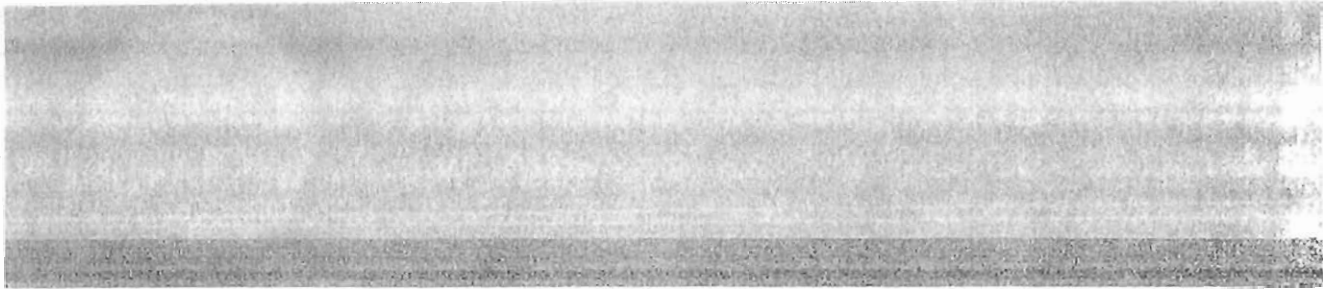
We strongly favor the passage of this bill, and urge you to support AB 2472 when it is heard by your Committee. Please feel free to contact CSEA at any time regarding this piece of legislation or the impact of any tax issue on California taxpayers.

Sincerely,

Lonnie Gary, EA  
CSEA, President

Lillian R. Lea, EA  
Chair, Legislative Affairs Committee

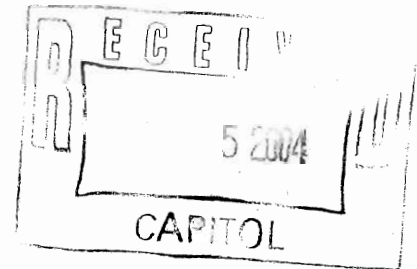
cc: Members, Assembly Judiciary Committee  
Assemblymember Lois Wolk  
Steve Baker, Aaron Read & Associates



1121 L STREET, SUITE 1050, SACRAMENTO, CA 95814 T. 916.441.7377 F. 916.441.5756

April 2, 2004

The Honorable Lois Wolk  
Member, California State Assembly  
State Capitol, Room 6012  
Sacramento, CA 95814



RE: SUPPORT FOR AB 2472

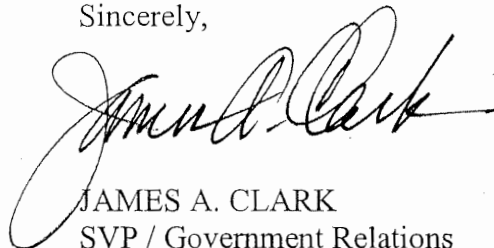
Dear Assembly Member Wolk:

The California Bankers Association (CBA) supports the concept of creating a state tax court, particularly if the state is considering combining the State Board of Equalization (SBE) and the Franchise Tax Board (FTB) into a single entity. We believe that taxpayers should have an independent forum short of superior court where disputes regarding the application of tax law can be resolved.

We also believe that having a court solely devoted to the resolution of tax matters will be beneficial to both the state and taxpayers. The precedents established by the tax court will provide for greater consistency in the administration of tax law.

Thank you for considering our views on this matter.

Sincerely,



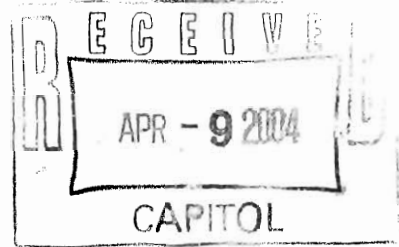
JAMES A. CLARK  
SVP / Government Relations

JAC:mb

# Genentech

IN BUSINESS FOR LIFE

780 Ninth Street, Suite 2180  
Sacramento, CA 95814  
(916) 443-5703  
Fax: (916) 444-8309



April 8, 2004

The Honorable Lois Wolk  
State capitol, Room 6012  
Sacramento, CA 95814

Re: Assembly Bill 2472 **SUPPORT IF AMENDED**

Dear Assemblymember Wolk:

On behalf of Genentech, I am writing to inform you of our support for AB 2472, which would reduce create a California Tax Court to determine certain tax appeals, should it be amended to include property tax disputes.

Genentech agrees that providing an independent forum for the resolution of certain tax appeals would provide a level playing field for disputes to be dealt with in a timely and consistent manner. We also believe that property tax appeals should be included in this system in order to provide a forum for these disputes that includes the rules of discovery and a "de novo" standard of review, would result in precedent, and so on.

For these reasons, we support AB 2472 if it is amended to include property tax.

Sincerely,

A handwritten signature in cursive script, appearing to read "Andrea Jackson".

Andrea Jackson

cc: Members, Assembly Judiciary Committee



## TAXATION SECTION

THE STATE BAR OF CALIFORNIA

April 12, 2004

The Honorable Lois Wolk  
Member of the Assembly, District 8  
State Capitol, Room 6012  
Sacramento, CA 95814

**AB 2472, as amended 4/1/04 – Support**  
**Taxation Section**

Dear Assm. Wolk:

The executive committee of the Taxation Section of the State Bar of California is pleased to support your AB 2742 for the reasons expressed in the attached report.

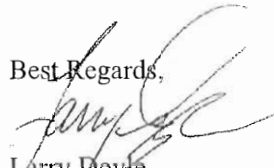
If you have any questions concerning this position, please contact either the author of the report, Charles J. Moll, III, at: (415) 268-7045, or myself at: (916) 442-8018.

**This position is only that of the TAXATION SECTION of the State Bar of California. This position has not been adopted by either the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California.**

**Membership in the TAXATION SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.**

Thank you.

Best Regards,

  
Larry Doyle  
Chief Legislative Counsel

cc: Drew R. Liebert, Chief Counsel, Assembly Judiciary Committee  
Mark Redmond, Republican Counsel, Assembly Judiciary Committee  
Charles J. Moll, III, Chair, Taxation Section  
Karen Pank, Deputy Legislative Secretary, Office of the Governor  
Rick Zanassi, Office of General Counsel, State Bar of California  
Saul Bercovitch, Office of Government Affairs, State Bar of California  
Winnie O. Scott, Chair, Board Committee on Stakeholder Relations



## TAXATION SECTION

THE STATE BAR OF CALIFORNIA

**TO:** Larry Doyle, Chief Legislative Counsel

**FROM:** Charles J. Moll III  
Morrison & Foerster LLP  
425 Market Street  
San Francisco, CA 94105-2482  
Phone: (415) 268-7045  
Fax: (415) 268-7522  
E-Mail: cmoll@mofo.com

**DATE:** April 7, 2004

**RE:** AB 2472 (Wolk) as amended April 1, 2004 (California Tax Court)

### SECTION/COMMITTEE POSITION:

☐ Technical comments and/or recommended amendments only

☒ Support

☐ Support if Amended

☐ Oppose Unless Amended

☐ Oppose

☐ Other (specify)

Date position recommended: March 26, 2004

Executive Committee vote: Ayes: 15 Noes: 0 N.V.: (2 Absent)

### STATEMENT OF POSITION:

The Taxation Section of the State Bar supports AB 2472.

### ANALYSIS:

#### (1) Summary of existing law.

Currently, California taxes are administered and collected by various administrative agencies such as the Franchise Tax Board ("FTB"), the State Board of Equalization ("SBE"), the Employment Development Department ("EDD") etc. The FTB primarily administers corporate franchise taxes and income taxes. The SBE administers sales/use taxes, state assessed property taxes and a myriad of other "special" taxes (*e.g.*, cigarette taxes, environmental taxes, fuel taxes, insurance taxes, etc.) The SBE also hears appeals of the taxes administered by the FTB. The EDD primarily administers employment taxes. Typically, an aggrieved taxpayer seeking to

appeal a final decision of these revenue collection agencies must first pay the tax and then file suit for refund in Superior Court.

AB 2472 has been introduced in the California Legislature that would create a California tax court to hear, on a prepayment basis, appeals from the SBE and FTB. This bill, among other things, would set the qualifications for, the term of office of, and the manner in which a judge is appointed to the California Tax Court; allow for an appeal before the California Tax Court in lieu of filing an appeal in the California Superior Court; and allow for an appeal to the Court of Appeal.

**(2) Why the section takes the current position and, where applicable, proposes changes in/amendments to the bill.**

The Taxation Section, and the State Bar, have supported similar bills since at least the 1960s, in order to improve the fair administration and adjudication of California's taxes.

Most of California's taxes are based upon self assessment by taxpayers. Without widespread adherence to this self-assessment system by California's taxpayers, California's taxes would be unadministerable.

Given the frequency with which citizens come into contact with government through the taxing authorities, it is important that such contact be seen as professional and fair. Nearly all citizens and certainly all businesses must deal with the taxing authorities each and every year, at least once if not quarterly for income taxes, at least once but as often as monthly for sales and use tax, not to mention the other taxes that individuals and businesses must pay.

When a dispute arises, it is all the more important that the resolution be fair and impartial. Where the judge is also the prosecutor, the credibility of the decision, even if correct, is undermined. While the staff of the FTB, the SBE, the EDD and other state agencies all act professionally and do the best job they can, they can make mistakes, and reasonable differences of opinion can arise between those agencies and taxpayers. Currently in California, all state tax disputes are adjudicated by a tax collection agency. Under current law, an aggrieved taxpayer must first pay the proposed tax, regardless as to how large or improper, before being able to have a full evidentiary hearing in the courts. This "pay-to-play" system is unfair to California taxpayers, and should be revised to conform with the federal system, and that of most other states.

A wide variety of interests support the creation of an independent tax court. For example, recently the bipartisan California Commission on Tax Policy in the New Economy, established by Governor Davis to review all state tax issues in light of California's changing economy, unanimously endorsed the creation of a California tax court modeled on the USTC. The very first reason cited was the lack of a sufficient prepayment procedure to contest assessments, noting that most taxpayers could not afford to "pay-to-play" and thus are "stuck

with whatever the SBE or its staff decides.”<sup>1</sup> Even the former director of the Multistate Tax Commission, Gene Corrigan, called California’s “pay-to-play” system “simply unfair.”

Academics support the idea as well. For example, distinguished University of California, Davis Law School Professor Daniel Simmons, who in 1978 was Chair of the California Commission on Government Reform (“Post Commission”) that examined conforming California’s tax code to the Internal Revenue Code, supports the creation of the tax court along the lines of the highly successful USTC model.<sup>2</sup>

### (3) Background information:

The SBE was created in 1872 to equalize property taxes across the State. At the time it was formed there were no personal or corporate income taxes, no sales and use taxes and few specialized taxes. When the Bank and Corporation Franchise Tax Act was originally enacted in 1929, the SBE and the State Controller both sought to administer the new tax. A compromise was reached whereby a new Franchise Tax Commissioner would be appointed by the Chairman of the SBE, the State Controller, and the Director of Finance. A similar struggle ensued in 1935, with similar results, when the personal income tax law was enacted. In 1949, the FTB replaced the office of the Franchise Tax Commissioner. The FTB consisted of the same three officers who formerly had the power to appoint the Tax Commissioner. Consequently, two of the FTB members also sit on the five member SBE, creating overlapping boards.

The rationale behind California’s “pay-to-play” system can be traced back at least to the United States Supreme Court’s 1870 decision of *Dows v. City of Chicago*. At the time *Dows* was decided, the states and municipalities relied primarily upon the payment of property taxes to operate, and did not have the wide variety of income, sales and other taxes that exists today.<sup>3</sup> The ability of states and municipalities to function with such limited funding sources necessitated that they be able to collect taxes in an orderly manner, even when some of those taxes were subject to challenge. Thus, the rule that a taxpayer must pay a tax in order to contest it served to protect the state from being paralyzed by taxpayers who might contest assessments, even if the taxpayer was in fact correct.

In the last 70 years, the complexity of the Revenue and Taxation Code, the size of the assessments at issue and the general nature of business have changed dramatically. Today, approximately 98 percent of personal and corporate income taxes and sales and use taxes paid to the State are self-assessed taxes. Unlike the concerns about the uninterrupted operation of government expressed in *Dows* that support “pay-to-play,” the State today simply is not going to collapse if taxpayers with legitimate complaints are able to contest the remaining 2 percent

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<sup>1</sup> See California Commission on Tax Policy in the New Economy, FINAL REPORT (December 2003), at p. 34.

<sup>2</sup> Letter from Daniel L. Simmons to the California Commission on Tax Policy in the New Economy, September 23, 2003 (attached to the Commission’s Final Report, at pp. 77-83).

<sup>3</sup> According to Professor Lawrence Friedman, about three-fourths of state revenues were generated from property taxes in the late 1800s. (See Lawrence Friedman, HISTORY OF AMERICAN LAW 567 (2nd ed. 1985). In contrast, today property taxes only account for about one-third of California’s general fund revenues.



before paying the proposed assessment. In addition, given the variety of funding sources available to the states, the rationale underlying “pay-to-play” is no longer viable.

Most other states have come to realize that this is indeed true. For example, in 1997 then Massachusetts Revenue Commissioner Mitchell Adams likened his state’s “play-to-play” system as one of “shoot first, ask questions later.” As a result of its bad reputation as a place to do business, in part because of its tax system, the Massachusetts Legislature in 1999 ended “pay-to-play.” Other states, such as Tennessee and Florida, have long allowed taxpayers to contest assessments prepayment in their civil courts with only the posting of a bond. Still others, such as Minnesota, New Jersey and Indiana, provide an administrative tax court that affords prepayment relief. And of course the United States government has long recognized the efficacy and reasonableness of allowing prepayment contests before impartial judges in the United States Tax Court (“USTC”).

There have been a variety of criticisms made about the proposal for an independent tax court in California. The first is that this is somehow an attack on the state agencies that currently administer taxes. This is simply untrue. No state agency is being abolished or replaced, rather this bill primarily provides for a new prepayment appeal to the Tax Court as an alternative to the current “pay-to-play” superior court system. Indeed, with the exception of appeals from the FTB of personal and corporate income taxes, all other taxes may still be appealed before the administrative agencies in the same manner as before. Thus, for example, the SBE still will be free to hold hearings, as it does currently, on sales and use tax matters, state assessed property tax matters, and the myriad other taxes that it currently administers, after the creation of an independent tax court. The only difference would be that California taxpayers, for the first time, would be afforded the opportunity to seek pre-payment review by an independent and impartial tax court judge following the hearing by the tax collection agency.

Second, some suggest that the SBE is adequate to the task and thus a new adjudicative body is unnecessary. However, the current 10 minutes afforded to each the taxpayer and the state in a hearing before the SBE is impossibly short to present a complex factual and tax legal case. As a result, taxpayer or government representatives often feel compelled to engage in ex parte communications with SBE members prior to the hearing to explain the case, even though the representatives may be reluctant to do so. Indeed, there has long been debate about the ethical considerations involved in such ex parte contacts.

More importantly, the SBE as presently constituted is just not equipped to act as a trial court. Some cases involve complex issues, tens of millions of dollars, cover several tax years and have thousands of pages of documentary evidence. If the SBE were to provide for full evidentiary hearings, the SBE likely would need to hold additional hearings covering most of the business days of the year. This would make it virtually impossible for the SBE members to perform their many other required duties.

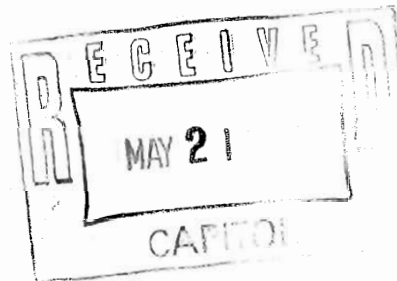
**(4) Germaneness.** This bill would create a California Tax Court modeled after the United States Tax Court, an area within the special knowledge of the Taxation Section. This bill will greatly improve the fair administration and adjudication of California’s taxes.

William M. Weintraub  
Direct (310) 201-3510  
Fax (310) 712-8510  
wmw@jmbm.com

1900 Avenue of the Stars, 7th Floor  
Los Angeles, California 90067-4308  
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Ref:

May 18, 2004



**VIA FACSIMILE AND FEDERAL EXPRESS**

Ms. Lois Wolk  
Assemblywoman  
State Capitol  
Room 6012  
Sacramento, CA 95814

Re: **AB 2472 (Wolk) as amended April 1, 2004 (California Tax Court)**

Dear Ms. Wolk:

I am writing on behalf of the Taxation Section of the Los Angeles County Bar Association in support of AB 2472 to establish a California Tax Court for the resolution of tax disputes.<sup>1</sup> What has been proposed by AB 2472 is neither radical nor untested. Rather, it proposes to establish a system for tax dispute resolution modeled after the United States Tax Court, a forum highly acclaimed for its fairness, efficiency, and effectiveness by all those affected, including taxpayers, taxpayers' representatives and the Internal Revenue Service.

The resolution of tax disputes between taxpayers and the agencies that administer taxes is an essential element of almost any system of taxation. We do not believe that the current procedures for resolving tax disputes in California best serves either the taxpayers of California or the agencies charged with the administration of taxes in California. We believe that the current system is deficient in at least three significant areas, particularly when compared to the federal tax dispute resolution system. Each of these deficiencies, which would be eliminated if AB 2472 were enacted into law, is summarized below:

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1/ I have just completed a two-year term as a Commissioner on the California Commission for Tax Policy in the New Economy, which was created by the legislature. The Commission unanimously recommended establishment of an Administrative Tax Court to resolve a wide range of tax disputes in California.

1. Perceived Lack of Independence.

Currently, the highest body in California to which a taxpayer can appeal a determination of any tax liability without payment of tax is the State Board of Equalization. However, this is the same organization that administers sales taxes in California. As a result, appeals to the State Board of Equalization suffer the appearance of a lack of independence between the staff members who conduct and review audits and the Members of the State Board of Equalization ("Board Members") who decide appeals. It is, after all, one agency. Similarly, the overlapping membership of the Franchise Tax Board and the State Board of Equalization presents the same perceived lack of independence with respect to the administration of individual income and corporate franchise and income taxes. Despite the most well-intended assurances of a fair hearing, many taxpayers and their representatives are skeptical. The appearance of a lack of independence is unavoidable under these circumstances.

More importantly, there is no practical alternative to the State Board of Equalization as the final arbiter of tax disputes since taxpayers who lose are required to pay the full amount of the tax deficiency determined by the State Board of Equalization, together with interest, in order to file a refund suit in Superior Court. Superior Court judges rarely hear tax cases. For obvious and very practical reasons, very few taxpayers avail themselves of this option.

In contrast, unresolved disputes over most federal taxes can be brought before the United States Tax Court, *without* the requirement for payment of any taxes, interest or penalties that the Internal Revenue Service claims that a taxpayer owes. The United States Tax Court is completely independent in every respect from the Internal Revenue Service. Almost all taxpayers understand that the United States Tax Court is not part of the Internal Revenue Service, that the judges of the United States Tax Court have no affiliation with the Internal Revenue Service, and that the United States Tax Court would not give undue deference to the determination of the Internal Revenue Service and its staff. In fact, the perceived independence of the United States Tax Court leads the Internal Revenue Service and taxpayers to settle most of their disputes.

California taxpayers deserve no less than the same perception of a fair hearing on the merits that the United States Tax Court provides to all taxpayers with federal tax disputes. California taxpayers should not be forced to wonder whether the Board Members may be influenced by other employees of the same agency, or what political considerations will bear upon the disposition of their cases. A California Tax Court would eliminate all doubt.

2. The State Board of Equalization Does Not Provide An Adequate Forum for Dispute Resolution.

In most hearings before the State Board of Equalization, taxpayers or their representatives are afforded ten minutes to present their cases. Ten minutes! For cases that involve complex facts or complex legal issues ten minutes is grossly insufficient. In many cases only a superficial presentation can be made to the State Board of Equalization. Moreover, it is inconceivable that Board Members are able to digest, analyze and properly render decisions on a large number of matters presented in such a short time period. This problem can be exacerbated by the fact that Board Members do not necessarily possess expertise in tax law.

In contrast, taxpayers who appear before the United States Tax Court are provided sufficient time to present their cases in an orderly fashion before judges who are thoroughly trained in tax law. Judges have the ability to hear and evaluate the oral testimony of witnesses. Most trials in the United States Tax Court result in the preparation of a complete record, consisting of a detailed stipulation of facts, stipulated exhibits, other exhibits submitted at trial and the testimony of the taxpayer and other witnesses. This comprehensive record provides the basis upon which a judge can render a reasoned and rational opinion.

3. The State Board of Equalization Does Not Routinely Publish It's Decisions.

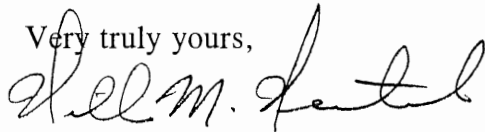
Published opinions of an administrative tax body serve several extremely important functions. First, written opinions disclose the facts and analysis relied upon for a judge to reach a decision. This serves to underscore that principle that decisions affecting the property rights of taxpayers are based upon a rule of law and not upon an arbitrary or unsupported conclusion. Second, the regular issuance of opinions furthers the development of tax law. Written opinions clarify the law by providing interpretation of statutes and regulations and provide precedent upon which taxpayers can rely in making decisions and upon which agencies can rely in administering the law. Third, written opinions assist in resolving disputes by providing each side with an ability to evaluate the likelihood of prevailing upon the merits of their cases.

The State Board of Equalization publishes few opinions, thereby depriving California taxpayers of the benefits described above. As a result, taxpayers often speculate about the fairness of an adverse decision while other similarly situated taxpayers are left without guidance or precedent in many important areas of tax law in the State of California. In contrast, the numerous opinions regularly published by the United States Tax Court provide a solid foundation for the administration of federal tax law.

Ms. Lois Wolk  
May 18, 2004  
Page 4

The enactment of AB 2472 would dramatically improve tax administration in California. While a California Tax Court would not replace the State Board of Equalization, it would provide the opportunity to have tax disputes resolved without the payment of tax, after a full presentation of the facts and legal arguments, before a judge whose independence is unquestioned and who is willing to explain, in writing, the basis of the decision. This would benefit all Californians. For these reasons, the Taxation Section of the Los Angeles County Bar Association strongly supports the passage of AB 2472.

Very truly yours,



WILLIAM M. WEINTRAUB,  
First Vice-Chair,  
Taxation Section of the  
Los Angeles County Bar Association

WMW:sll

cc: Ms. Judy Chu, Assemblywoman (via facsimile and Regular Mail)